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UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

No. 4032

GEO. F. ALGER COMPANY OF DETROIT, MICH., A MICHIGAN CORPORATION, ET AL.,

Plaintiffs,

vs.

JOHN W. PECK, TAX COMMISSIONER, DEPARTMENT OF TAXATION, STATE OF OHIO, AND MEMBER OF THE OHIO RECIPROCITY BOARD FUNCTIONING UNDER SECTION 5728.15, REVISED CODE OF OHIO, ET AL.,[1]

Defendants

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, plaintiffs-appellants submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the Three-Judge Statutory District Court entered in this cause dismissing plaintiffs' complaint.

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[1] A complete list of the 60 plaintiffs and 9 defendants is set forth in Appendix "B", *infra.*

Opinion Below

The District Court did not render an opinion in this case. A copy of the finding, conclusion, and order of the Court dismissing the complaint for lack of jurisdiction over the subject matter, with the dissent of Circuit Judge Allen, and a copy of the order amending the foregoing order, are attached hereto as Appendix "A".

Jurisdiction

Because one of the matters as to which relief was sought in plaintiffs' amended complaint filed in the entitled proceedings was the restraining of the enforcement of a tax statute of the State of Ohio, a Three-Judge Statutory District Court was convened. The judgment of the Three Judge District Court dismissing the complaint for lack of jurisdiction over the subject matter was entered on February 19, 1954, and was amended on the Court's own motion, in certain minor details, on February 26, 1954. A petition for re-opening, reargument and reconsideration of the finding, conclusion and judgment dismissing the complaint was filed by the plaintiffs on March 1, 1954 and was denied by the District Court on March 17 1954. The petition for appeal is presented to the District Court herewith, to wit, on March 25, 1954. The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b), and is sustained by the decisions in *Clark* v. *Poor,* 274 U. S. 554, and *Georgia R. Co.* v. *Redwine,* 342 U. S. 299.

Question Presented

The question presented is whether the plaintiffs have "a plain, speedy and efficient remedy in the courts of" the

State of Ohio, within the meaning of Title 28, Section 1341, United States Code.

Statutes Involved

Title 28, Section 1341, United States Code, provides as follows:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

The pertinent provisions of Sections 5717.02, 5717.03, 5717.04, and 5728.01 through 5728.15 inclusive, Revised Code of Ohio, are set forth in Appendix C attached hereto.

Statement of the Case

A. *Statute involved*

On July 16, 1953, the General Assembly of the State of Ohio passed an Act, later approved by the Governor, imposing a graduated tax, termed a "highway use tax", of from one-half cent to two and one-half cents per mile on all commercial vehicles with three or more axles operated over the public highways of Ohio. Two-axle vehicles are exempt from the tax, as are also trailers whose total weight, excluding load, is less than 3,000 pounds. This Act became effective October 1, 1953, and the first highway use tax returns and the payment of the tax for the quarter October-December, 1953 were due January 20, 1954. The pertinent provisions of this Act of the General Assembly are set forth in Sections 5728.01 through 5728.14, Revised Code of Ohio. Appendix C, *infra*.

B. *Nature of plaintiffs' business*

Each of the 60 plaintiffs herein is a motor carrier engaged in the transportation of freight in interstate commerce by

motor vehicle and holds either a certificate of public convenience and necessity or a permit to so engage issued to each such carrier by the Interstate Commerce Commission under the provisions of Part II of the Interstate Commerce Act (49 U. S. C., Secs. 301 *et seq.*), sometimes called the "Motor Carrier Act of 1935." Each of the plaintiffs has duly registered such interstate operating authority with the Public Utilities Commission of Ohio and has been granted and holds authority to conduct motor carrier operations in interstate commerce over the public highways of the State of Ohio, and in connection therewith collectively own and/or operate "commercial tandems" and "commercial tractor combinations" as defined in Section 5728.01, Revised Code of Ohio, such vehicles having 3, 4, 5 or 6 axles, over the highways of Ohio.

C. *Summary of Provisions of Statute.*

Sections 5728.01 through 5728.14, Revised Code of Ohio, provide in pertinent part as follows:

Every owner of a motor vehicle covered by the Act is required to obtain annually a highway use permit for each such vehicle from the registrar of motor vehicles for which a fee of $2.00 is required (Sec. 5728.02). In applying for this permit the owner must state his estimate of the greatest number of axles which will be on any combination of trailers or semi-trailers with which the vehicle will be operated during the period covered by the permit (Sec. 5728.02). The permit specifies the maximum number of axles allowed in any combination of which the vehicle is a part, and there is a penalty for using such vehicle in a combination with a greater number of axles and for operating a vehicle subject to the tax without first securing the permit (Sec. 5728.04). Records must also be kept of the number of miles such motor vehicles are operated over the highways of Ohio and

this mileage reported quarterly to the treasurer of state on a highway use tax return (Sec. 5728.07, 5728.08, 5728.09).

The amount of the tax is determined by multiplying the reported mileage by the tax rate (½¢ to 2½¢) applicable to the type of vehicle and the maximum number of axles for which the highway use permit was issued, and the tax so determined must be paid quarterly (Sec. 5728.06). Where a portion of the mileage traveled on the highways of Ohio has involved the use of a less number of axles than is specified by the permit, the taxpayer may after the end of the calendar year apply for a refund of the amount paid in excess of the tax calculated on the basis of the rate applicable to the number of axles actually used (Sec. 5728.06).

In the event the highway use tax return is not filed within the time prescribed, or is incomplete or incorrect, or if the full amount of the tax due is not remitted with the return, the Tax Commissioner may make an assessment against the person claimed to be liable for the tax, to which assessment a penalty of 15% shall be added (Sec. 5728.10). Power is given the Tax Commissioner to adopt regulations providing for the remission of such penalties. Such an assessment must be made within four years from the end of the calendar year in which the tax was due, except in the case of a person who failed to file a highway use tax return.

The Tax Commissioner is also given certain other powers in connection with the administration of the act, including the power to promulgate rules and regulations pertaining to the levy and collection of the highway use tax (Sec. 5728.14).

The review procedure provided in Sec. 5728.10 itself is as follows: Written notice of an assessment is served by the Tax Commissioner on the person against whom the assessment is made. Such person has 30 days from the date of such service within which to file with the Tax Com-

missioner a petition in writing setting forth his objections to the assessment, and a hearing is had before the Tax Commissioner. From the ruling of the Commissioner an appeal may be taken to the Board of Tax Appeals as provided in Section 5717.02, Revised Code of Ohio.

After the expiration of the period (30 days) within which the person assessed may appeal to the Board of Tax Appeals, the Tax Commissioner is required to file a certified copy of the entry making the assessment final with the clerk of the courts in the county in which the person assessed resides or has his place of business or with the clerk of courts of Franklin County if the person assessed is a non-resident (Sec. 5728.10). Immediately upon the filing of such entry, the clerk of courts is required to enter a judgment against the person so assessed in the amount shown on the entry. From that date the assessment, which includes taxes and penalty, bears the same rate of interest and has the same force and effect as other judgments. Execution shall issue thereon upon request of the Tax Commissioner, and all provisions of law applicable to sales on execution shall be applicable to sales under such judgment.

At the time of filing the certified copy of an entry making an assessment final as provided in Section 5728.10, the Tax Commissioner is required to notify the Registrar of Motor Vehicles and direct that officer to suspend all highway use permits issued to the person against whom such assessment was made, except that no highway use permit can be suspended while an appeal is pending (Sec. 5728.11).

D. *Nature of the Case.*

Plaintiffs attack Sections 5728.01 through 5728.14 inclusive as being in violation of the Commerce Clause of the Constitution and also as depriving them of due process and equal protection of the law in contravention of the

Fourteenth Amendment. The complaint, which was supported by affidavits, asked that a three-judge district court be convened, that Sections 5728.01 through 5728.14 be declared unconstitutional, and that the defendants, who are all officials of the State of Ohio, be enjoined from imposing the highway use tax on plaintiffs. Plaintiffs applied for a temporary injunction and defendants moved to dismiss the action on the ground "that the court lacks jurisdiction over the subject matter by virtue of Title 28, Section 1341, United States Code".[2] Both motions were heard together and further evidence was received in the form of affidavits. At this hearing defendants' attorney agreed that no adequate remedy was available by way of payment of the tax under protest and suit to recover it (Transcript 13). Relying upon the provisions of Section 5728.10, which outlines the procedure to be followed as a prerequisite to an appeal being taken under Section 5717.02 to the Board of Tax Appeals, as hereinbefore set forth, and the provisions of Section 5717.04 which permit an appeal being taken from the Board of Tax Appeals to the Supreme Court of Ohio or to the appropriate court of appeals thereof, defendants contended that "a plain, speedy and efficient remedy" is available to plaintiffs "in the courts of" Ohio. The position of defendants, in connection therewith, was stated to the court in the following language by their counsel (Transcript 8-9):

> "We cannot proceed against any of these plaintiffs; we cannot collect any highway tax excepting pursuant to an assessment made by the Tax Commissioner. When that assessment is made it must be served upon the taxpayers, the person alleged to owe the tax, either

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[2] Defendants also moved to dismiss on the ground that the complaint failed to state a cause of action and moved to strike portions of the complaint.

personally or by registered mail. No question that a secret assessment is going to be made.

"Following the service of that assessment that man can apply to the tax Commissioner for immediate termination or he can appeal to our board of tax appeals. The board of tax appeals in the state of Ohio is a quasi-judicial body composed of three members which will hear the matter *de novo* and which will consider only the record which comes up from the tax commissioner, who hears evidence from both sides as to any evidence which the parties feel is relevant to the issue. Still no tax being paid.

"From the board of tax appeals there is an automatic appeal, which does not depend on writ of certiorari. There is an automatic appeal into the Supreme Court of Ohio, and the Supreme Court, of course, does not take additional evidence, but the Supreme Court of Ohio rules upon the record and considers the evidence which has been before the Ohio Board of Tax Appeals. It may affirm; it may reverse; or vacate, if it finds the decision to be unreasonable or unlawful.

"If federal questions are involved the writ of certiorari lies to the United States Supreme Court, the same as it does from any other state proceedings.

"We submit to the Court this represents a plain, speedy and efficient remedy on behalf of the plaintiffs, which deprives this Court of jurisdiction to enjoin us from the state tax."

Thereafter, on February 19, 1954, a majority of the District Court issued an order finding that a plain, speedy and efficient remedy may be had in the courts of Ohio and sustaining defendants' motion to dismiss on the ground that the court has no jurisdiction over the subject matter.[3] Circuit Judge Allen dissented from the judgment of the majority of the court in dismissing the amended complaint, holding that there is not a plain, speedy and efficient remedy

[3] This order was amended on February 26, 1954 to apply to plaintiffs' amended complaint.

in the courts of the State of Ohio. Plaintiffs' petition for reconsideration, filed March 1, 1954, was denied on March 17, 1954.

The Question Involved Is Substantial

1. The basic issue in this case—the validity of the Ohio highway use tax—while not directly presented on this appeal, must be kept in mind in determining the importance of the issue presently presented as to the sufficiency of the remedy available in the courts of Ohio to justify the invoking of the bar of 28 U. S. C. Sec. 1341 to the jurisdiction of the federal courts.

Plaintiffs are all engaged in interstate commerce, being motor carriers engaged in the interstate transportation of property by motor vehicle, and they are under an obligation to maintain reasonable, continuous service over the routes assigned to them which run through, into and out of the State of Ohio as well as other states, and the rates which they charge are subject to regulation by the Interstate Commerce Commission. Their complaint alleges that this new highway use tax is excessive and discriminatory, and that its enforcement will destroy the existing rate structure and constitute an encroachment on the power of the federal government to regulate interstate commerce. It alleges further that the actions of defendants in the administration and enforcement of the statute in question will disrupt their interstate transportation business, will jeopardize their interstate certificates which provide that plaintiffs shall render reasonably continuous and adequate service to the public, will interfere with the normal movement of interstate shipments being offered to plaintiffs for transportation over the highways of Ohio and will destroy plaintiffs' investments in their transportation facilities located in Ohio and elsewhere, resulting in an undue burden on interstate

commerce and the taking of plaintiffs' property without due process of law.

Plaintiffs constitute an important segment of this vital field of interstate commerce. Collectively they employ more than 18,000 persons, operate motor vehicle equipment having an approximate value in excess of $57,000,000 and operate other properties (terminals, etc.) in connection with their respective businesses having an approximate value in excess of $19,000,000.

However, the effect of the administration and enforcement of this unconstitutional statute goes far beyond the business of plaintiffs alone. The entire motor carrier industry is dependent for the maintenance of a competitive rate structure upon the system of reciprocal agreements among the states which has been developed over the years. Under these agreements the individual states, including the State of Ohio, have waived the collection of their motor vehicle taxes from out-of-state motor carriers where the states in which such motor carriers are domiciled and taxed grant a like reciprocal waiver. The State of Ohio is strategically situated athwart some of the principal east-west and north-south routes for the interstate transportation of property by motor carrier. This new Ohio highway use tax statute is being administered in such a way as to bring about the destruction of this system of reciprocal agreements.

When the General Assembly of the State of Ohio enacted Sections 5728.01 through 5728.14 it, at the same time, enacted 5728.15 Revised Code. Section 5728.15 exempts from the provisions of 5728.01 through 5728.14 all owners of motor vehicles whose vehicles are registered in other states which grant highway use tax exemptions to the owners of vehicles registered in the State of Ohio, under reciprocal agreements entered into with the State of Ohio. Section

5728.15 mandatorily requires that such reciprocal agreements be so entered into by defendants, the Attorney General, the State Tax Commissioner, and the defendant member of the Public Utilities Commission of Ohio. *The Board of Supervisors of Rock Island County* vs. *The United States, on the Relation of the State Bank*, 71 US 435; *Mason, et al.*, v. *Fearson*, 50 US 247 at page 258, 13 L. Ed. 130; *United States Sugar Equalization Board, Inc.*, v. *P. DeRonde & Co., Inc.*, Third Cir., 7 F2d. at page 986; *Mayor, etc., of Baltimore* v. *Marriott*, 9 Md. 160, 174, 66 Am. Dec. 326; *Town of Flagstaff* v. *Gomez*, 29 Ariz. 481, 242 P. 1003; *Smith* v. *City Commission of Grand Rapids*, 281 Mich, 235; *State, ex rel. Myers* v. *The Board of Education of Rural School District of Spencer Township, Lucas County, Ohio*, 95 O. S. 367; *Columbus Springfield & Cincinnati Rd. Co.*, v. *Mowatt*, 35 Ohio St. 284; *State ex rel. Sawyer* v. *Mangni, et al.*, 43 N. W. 2d, page 778 (Minn.); *Palmcroft Development Company, Appt.*, v. *City of Phoenix*, 49 P. 2d. 626 (Ariz.); *Chase* v. *United States*, 261 F. 833 (CAA 8th Circuit). Already certain states have cancelled their reciprocal agreements with the State of Ohio in retaliation against said defendants' expressed refusal to carry out the mandatory provisions of Sec. 5728.15 thereof providing for such reciprocity, and as a result a multiple burden of taxation is being placed on the motor carrier industry—Cf. *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 346 U. S. 157, 170. The position of the defendants in connection with said Section 5728.15 was stated to the court upon oral argument by their counsel as follows:

> *"We reserve the right to determine whether we will enter into such reciprocal agreements at all, because this tax was enacted primarily for revenues for constructing highways. These people use the highways and if we levy a tax for revenue and then give it away by reciprocal agreements, we will not raise the revenue*

we set out to achieve." (Page 6, Transcript Oral Argument before this Court on February 11, 1954) (Emphasis supplied).

As this system of reciprocal agreements continues to collapse, the pyramiding of the tax burden on all carriers will have all the destructive effects of a rate-war. The inevitable result will be to disrupt the entire motor carrier industry and nullify the efforts of Congress to stabilize the industry by vesting control of it in the Interstate Commerce Commission.

Where there is any uncertainty as to the adequacy of the remedy in the state courts, the District Court should retain jurisdiction. *Hillsborough* v. *Cromwell*, 326 U. S. 620, 626; *Spector Motor Service* v. *O'Conner*, 340 U. S. 602, 605. Where matters of such great import are involved, we submit that the state remedy should be measured by a particularly exacting standard in determining whether it is sufficient under 28 U. S. C. Sec. 1341 to deprive a federal court of jurisdiction. In such a case as this a decision by a divided court holding that the federal court was without jurisdiction certainly presents a substantial question.

2. Irrespective of the other qualifications required of the state court remedy by 28 U. S. C. Sec. 1341, the remedy urged by defendants is not "plain".

(a) No opinion was filed by the divided court in which is pointed out the remedy available in the Ohio courts. The remedy urged on the court by defendants' attorney, which the court obviously must have adopted in granting the motion to dismiss the complaint, begins with the review procedure through the Tax Commissioner and the Board of Tax Appeals as prescribed in Section 5728.10, Revised Code. Yet Section 5728.10 is contained in the very statute under attack in this proceeding as being unconstitutional. A somewhat similar situation was presented in *Diggs* v. *Board of*

Embalmers, 321 Mich. 508 (1948), certiorari denied, 335 U. S. 885, where a person, whose license as an embalmer was revoked by the Board, sought equitable relief in the courts from this order on the ground that the statute under which the Board acted was unconstitutional. The Board contended that plaintiff was not entitled to resort to equity and moved to dismiss his bill of complaint as he had an adequate remedy at law by an appeal from the decision of the Board to the Circuit Court under a provision of the statute in question. In rejecting this contention the Supreme Court of Michigan said (321 Mich. at 513):

> "* * * If plaintiff's position is correct, in other words, if the entire statute is unconstitutional, then the provisions with reference to an appeal from an order of defendant board would necessarily fall with the rest of the act. It is scarcely logical to say that plaintiff is bound to press a remedy ostensibly granted by the statute the validity of which he assails."

The principles by which the adequacy of the legal remedy is weighed in determining the right to equitable relief are analogous to those applied in determining the sufficiency of the state remedy under 28 U. S. C. Sec. 1341. Hillsborough v. Cromwell, 326 U. S. 620, 622-623. It follows, therefore, that the rule announced in the above case is applicable here, and the District Court has erred in sustaining the review procedure established by the very statute the constitutionality of which is under attack as meeting the requirements of Section 1341 to bar federal jurisdiction.

(b) As we have pointed out, the review procedure provided in Section 5728.10, Revised Code of Ohio, calls for a petition for reassessment to be filed with the Tax Commissioner, a hearing before and a redetermination of the assessment by the Commissioner, with an appeal from his ruling to the Board of Tax Appeals of the State following

the procedure prescribed in Section 5717.02, Revised Code. On oral argument defendants' attorney conceded that neither the Tax Commissioner nor the Board of Tax Appeals had any authority or jurisdiction to declare a State statute unconstitutional, and that, therefore, the issues raised by plaintiffs as to the unconstitutionality of the statute would not receive consideration by the Tax Commissioner or the Board of Tax Appeals but would be overruled.[4] This concession was made in the following colloquy (Transcript 13-14):

> "Mr. Gill: * * * When I say to this Court I feel there is a speedy remedy at law, I am referring to assessment procedure stated in the highway-use law to which I have referred this Court.
>
> "The Court: (Judge Allen) Could any constitutional question be tried out before the taxing court?
>
> "Mr. Gill: A constitutional question certainly could be raised before the Supreme Court of Ohio. You have raised the question whether the Board of Tax Appeals could and would decide the constitutional questions involved in this case. It is certain that the tax commissioner probably would not endeavor to pass upon them. The Board of Tax Appeals would probably. The procedure would probably be this: Objections on the grounds of constitutionality would be made. The great majority of those objections would probably be overruled by the Board of Tax Appeals on the ground their function is not to test constitutional questions. However a complete record can be made * * * and I feel the Supreme Court of Ohio in reviewing any tax assessment coming before the Board of Tax Appeals will have before it everything it needs by the

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[4] In *Standard Oil Company* v. *Glander*, 155 O.S. 61, the court said: "The contentions of the appellant (as to the constitutionality of the assessment) were rejected in their entirety by the Tax Commissioner * * *. Upon appeal the Board of Tax Appeals * * * announced that, being an administrative tribunal, it had no jurisdiction to decide the constitutional question presented."

way of evidence to determine the constitutional question."

From this concession by defendants it follows that the review procedure up through the Board of Tax Appeals, far from being a "plain, speedy and efficient remedy", is not even a "remedy". A remedy is the means employed to enforce a right or redress an injury. *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372, 384.

From its very nature, a remedy must afford a means for relief. The relief which plaintiffs seek is a declaration as to the unconstitutionality of this state statute and an injunction against its enforcement. Defendants concede that this relief cannot be had before the Tax Commission or the Board of Tax Appeals. Therefore, such a review is not a remedy.

(c) Moreover, even if it were conceded *arguendo* that review through the Tax Commissioner and the Board of Tax Appeals is a remedy, there still remains the fact that it is not a "remedy * * * in the *courts*" of Ohio as required by Section 1341 (emphasis supplied). As the defendants themselves recognize, the Commissioner and the Board have no judicial power. Article IV, Section 1, of the Ohio Constitution vests all judicial power of the State in the Supreme Court of Ohio and certain other specified courts. Article IV, Section 10, requires that all judges (with certain exceptions not here material) be elected; the Tax Commissioner and the members of the Board of Tax Appeals are not elected, but instead are appointed. Although proceedings before the Board of Tax Appeals are sometimes termed quasi-judicial, it is still an administrative board. *Zangerle* v. *Evatt*. 139 O. S. 563 (1942).

(d) The Supreme Court of Ohio and the various Ohio Courts of Appeals have only appellate jurisdiction (See Constitution of Ohio, Article IV, Sections 2 and 6). The

exercise of such jurisdiction necessarily presupposes, at least as to questions of law, that there has already been full consideration and a judicial determination of such questions by a *nisi prius* court. Such would not be the case here.

Going beyond the consideration of the sufficiency of the state procedure to meet the requirements of 28 U. S. C., Sec. 1341, there is a serious question as to whether this particular procedure meets even the requirements of due process under the Fourteenth Amendment. Article IV, Section 2, of the Ohio Constitution provides:

> "No law shall be held unconstitutional and void by the Supreme Court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the Court of Appeals declaring a law unconstitutional and void".

This provision requires the concurrence of six of the seven judges of that court, and not merely the concurrence of all but one of the judges sitting, in order to declare a law unconstitutional. *Royal Green Coach Co.* v. *PUCO*, 110 O. S. 41 (1924). It was attacked in *State of Ohio* v. *Akron Metropolitan Park Dist.*, 281 U. S. 74, as being in conflict with the due process clause of the Fourteenth Amendment, and the Supreme Court of the United States disposed of this argument there by saying (281 U. S. at 80):

> "As to the due process clause of the Fourtenth Amendment, it is sufficient to say that, as frequently determined by this court, the right of appeal is not essential to due process, *provided that due process has already been accorded in the tribunal of first instance.* *McKane v. Durston*, 153 U. S. 684, 687, 14 S. Ct. 913, 38 L. Ed. 867; *Pittsburgh, etc., Railway Co.* v. *Backus*, 154 U. S. 421, 427, 14 S. Ct. 1114, 38 L. Ed. 1031; *Reetz* v. *Michigan*, 188 U. S. 505, 508, 23 S. Ct. 390, 47 L. Ed. 563; *Rogers* v. *Peck*, 199 U. S. 425, 435, 26 S. Ct. 87, 50 L. Ed. 256; *Standard Oil Co. of Indiana* v. *State of*

Missouri, 224 U. S. 270, 286, 32 S. Ct. 406, 56 L. Ed. 760, Ann. Cas. 1913D, 936. The opportunity afforded to litigants in Ohio to contest all constitutional and other questions fully *in the common pleas court and again in the Court of Appeals plainly satisfied the requirement of the Federal Constitution in this respect*, and the state was free to establish the limitation in question in relation to appeals to its Supreme Court in accordance with its views of state policy". (emphasis supplied).

In that case the fact that "*due process has already been accorded in the tribunal of first instance*" was an essential part of the *ratio decidendi. That fact does not exist in this case, as both the tribunal of the first instance and even the tribunal to which the first appeal would be taken are conceded to be without the authority to pass on constitutional questions.* Thus, should plaintiffs be compelled to resort to the review procedure which defendants insist must be followed, the fundamental question as to whether this provision of the Ohio Constitution is consistent with due process under the Fourteenth Amendment will once again be presented to this Court.

The foregoing, we submit, demonstrates that there is not a plain remedy available to plaintiffs in the Ohio Courts. We shall now consider whether the review procedure as proposed by defendants is speedy.

3. It is apparent that the review procedure prescribed in the highway use tax statute is not speedy, inasmuch as it requires that the claim of unconstitutionality be first heard before the Tax Commissioner and the Board of Tax Appeals, despite the fact that neither has the authority to pass on this issue. Moreover, the initiation of this review procedure must in every case await assessment by the Tax Commissioner. The effect of this provision is to give the Tax Commissioner the initiative in determining when the

review procedure is to be begun. Under the statute the period of limitation within which the assessment must be made is four years after the end of the calendar year in which the alleged tax liability accrued. Thus the Tax Commissioner is free to wait for this period before making the assessment, and every day he delays is a day in which plaintiffs are left without any remedy whatever. True, the Tax Commissioner has already made assessments against some of the plaintiffs herein *since* the institution of this proceeding, and he has stated that he is proceeding as quickly as possible to make assessments against the remaining plaintiffs. The fact remains, however, that all of the assessments have not yet been made, and there can now be no assurance when they will be made. In any event a remedy which must await this action by the Tax Commissioner by its very nature, we submit, lacks the speediness required under 28 U. S. C. Section 1341 to bar the jurisdiction of the federal court.

In addition, experience in other cases where review was sought before the Tax Commissioner and the Board of Tax Appeals has demonstrated that such a procedure is not speedy and efficient. Exhibit A to plaintiffs' Brief in support of their petition for reconsideration was a table covering ten recent Ohio sales tax cases showing the elapsed time from the date tax liability accrued to the date of the decision by the Supreme Court of Ohio, after administrative review by the tax commissioner and the board of tax appeals. These periods varied from three years and eleven months to as much as nine years and seven months. By no definition of the term can this be considered "speedy".

4(a). The review procedure under the highway use tax statute is not an efficient remedy, for it subjects plaintiffs to a penalty of 15%. Defendants have apparently recognized that the existence of this penalty provision in the statute raises a substantial question as to the efficiency of

the procedure prescribed in the statute under attack, as they have been careful to point out that the Tax Commissioner is now promulgating regulations which will provide for relief from this penalty in certain cases. This, we submit, is not sufficient to correct the deficiency in the procedure itself. Relief from this penalty, according to this proposal of defendants, will always be subject to the discretionary action of the Tax Commissioner, either in promulgating the regulations or in acting under them. Since this proposed relief rests in the discretion of the Tax Commissioner, it is not available as of right; since it is not available as of right, it of course is not a remedy; much less a "plain, speedy and efficient remedy". See *Mountain States Co.* v. *Public Service Commission, supra.*

The imposition of the 15% penalty would be a drastic punishment to plaintiffs for seeking to test the constitutionality of this statute. In *Spector Motor Service* v. *Walsh*, 139 F. 2d 809, 820 (C. C. A. 2, 1944), it was held that an action for declaratory judgment to test the validity of a state tax was "hardly an effective remedy in view of the drastic penalties provided by the statute for the nonpayment of the tax". The penalty assessed in that case was 25%. 139 F. 2d at 812. However, since the amount involved in that case was so small (25% of $6,122.77, covering a period of 5½ years) as compared with the amount here involved (15% of approximately $577,000 for only three months), it is apparent that the 15% penalty here is much more burdensome than the 25% penalty in the *Spector* case. Although the Supreme Court vacated the judgment in the *Spector* case and sent it back so that a declaratory judgment action might be brought in the State court, nevertheless jurisdiction of the case was retained in the federal court and federal jurisdiction was ultimately sustained. *Spector Motor Service* v. *O'Connor*, 340 U. S. 602, 605.

(b) There is also the matter of the requirement that vehicles subject to the tax must have highway use permits in order to use the highways of Ohio. These highways use permits now in effect will expire March 31, 1954. New permits must be obtained before that time, and that will be valid for only one year. There is no assurance that new permits will be issued to the plaintiffs for the year beginning April 1, 1954, in view of the fact that they have not yet paid and are refusing to pay the tax which the State of Ohio claims to be due for the last quarter of 1953. Even if such use permits should be issued this year, there is still no assurance that similar permits would be issued for the next year, for the period beginning April 1, 1955. Under the statute the Tax Commissioner had a broad power to promulgate and enforce regulations. Since there is no express provision in the statute covering the eligibility for a use permit of applicants situated as plaintiffs are now, obviously this subject is within the scope of the Commissioner's power to control by regulation. Thus plaintiffs on this score are again left to the uncertainties of the future action of the Commissioner. A refusal of the highway use permit would bring to an abrupt halt all of their interstate commerce operations which involved in any way the use of the highways of Ohio.

(c) The remedy under Ohio law is inefficient for the further reason that it involves a multiplicity of actions. Assessments under the highway use tax are made quarterly. The person assessed must take an appeal from each assessment in order to protect his rights. Thus under Ohio law each plaintiff herein will be required to take four appeals per year until a final decision is obtained. Exhibit A to plaintiffs' brief in support of their petition for reconsideration shows that ten recent appeals in sales tax cases took an average of about two and one-half years from the date of the assessment by the Tax Commissioner to the date of

the decision in the Supreme Court of Ohio. On that basis pursuit of the state remedy would require each plaintiff to take ten appeals plus such additional appeals as would be necessary while its case was being taken from the Supreme Court of Ohio to the Supreme Court of the United States.

Conclusion

Plaintiffs are seeking relief in the Federal Court because the State of Ohio has forced them to do so. None of the state courts of Ohio can give them injunctive relief because of the prohibition in Section 5703.38, Revised Code of Ohio, against enjoining the Ohio Department of Taxation. Defendants themselves admit that adequate relief is not available to plaintiffs by paying the tax under protest and suing in the Court of Common Pleas to recover it. The only possibility which remains is the review procedure urged by defendants, which we submit is totally inadequate as a "plain, speedy and efficient remedy * * * in the courts of" Ohio within the meaning of 28 U. S. C. Section 1341 for the following reasons:

1. This review procedure is that provided by the very statute under attack as being unconstitutional. It is illogical to say that the proper procedure for attacking the constitutionality of a state statute is the review procedure set up in the statute itself.

2. That review procedure could not even be begun until after the Tax Commissioner had made an assessment, which could be as long as four years and eleven months after the tax liability was alleged to have accrued. The initiative being with the Tax Commissioner, and such a long delay being possible, this procedure could hardly be considered speedy.

3. It called for the filing of a "petition for reassessment" with the Tax Commissioner, which clearly con-

templated a review of such factual questions as dollar and cent amount of tax, valuation, taxable situs, etc., and not a challenge of the constitutionality of the tax statute itself.

4. The Tax Commissioner is not a "court" within the meaning of Title 28, Section 1341, United States Code, he has no judicial power under Ohio law, and consequently no authority or jurisdiction whatever to pass on the constitutionality of a tax statute of Ohio.

5. The appeal from the Tax Commissioner to the Board of Tax Appeals would merely remove the case to another forum of futility; the Board of Tax Appeals is likewise not a "court" within the meaning of Title 28, Section 1341, United States Code, it has no judicial power under Ohio law, and consequently no authority or jurisdiction to pass on the constitutionality of a tax statute of Ohio.

6. This administrative review procedure involves the same multiplicity of actions as would be involved in suing in the Court of Common Pleas for the recovery of the tax after paying under protest, a remedy which defendants admit is inadequate. For each tax year for the plaintiffs herein there would be 240 petitions for reassessment, 240 hearings before the Tax Commissioner, 240 appeals to the Board of Tax Appeals with 240 hearings there, 240 appeals to the appropriate Court of Appeals of Ohio and 240 appeals from there to the Supreme Court of Ohio (or directly to the Supreme Court).

7. The provision in the Ohio Constitution which in effect requires the concurrence of six out of the seven judges of the Supreme Court of Ohio to declare a law unconstitutional, raises a substantial question as to whether the review by that Court on appeal from the

Board of Tax Appeals under this proposed procedure would even meet the requirements of due process under the Fourteenth Amendment.

For the foregoing reasons, we respectfully submit that the question presented on this appeal is substantial, that the judgment of the District Court should be reversed and the cause remanded for the consideration of plaintiffs' complaint on its merits.

Respectfully submitted,

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Columbus 15, Ohio;
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Attorneys for Plaintiffs.

APPENDIX "A"

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

No. 4032

Filed February 19, 1954, Howard E. Parker, Clerk

GEO. F. ALGER COMPANY OF DETROIT, MICH., a Michigan Corporation, et al., *Plaintiffs*,

vs.

JOHN W. PECK, Tax Commissioner, Department of Taxation, State of Ohio, and member of the Ohio Reciprocity Board functioning under Section 5728.15, Revised Code of Ohio, et al., *Defendants*

Before Allen, Circuit Judge, Druffel and Cecil, District Judges

ORDER

This case came on to be heard upon the motion of the Attorney General of Ohio, filed on behalf of the defendants to dismiss the within action on the ground that the court lacks jurisdiction over the subject matter by virtue of Title 28, Section 1341, United States Code; to dismiss the action because the complaint fails to state a claim against defendants upon which relief can be granted and to strike certain allegations from the plaintiffs' complaint: and upon a motion and application of the plaintiffs for an interlocutory injunction to be effective pending the final determination of the matters at issue herein, restraining and enjoining defendants from enforcing against the plaintiffs the provisions of Sections 5728.01 to 5728.14 inclusive, Revised Code of Ohio, insofar as the provisions thereof relate or purport to relate to the vehicles used and operated by plaintiffs in Interstate Commerce under the jurisdiction of the Interstate Commerce Commission upon and over the highways of the State of Ohio.

The motions were submitted to the court upon briefs and oral arguments of counsel;

On consideration whereof, the majority of the court finds that a plain, speedy and efficient remedy may be had in the courts of the State of Ohio.

It is, therefore, ordered that the motion of the Attorney General filed on behalf of the defendants to dismiss for the reason that the court lacks jurisdiction over the subject matter be, and it hereby is sustained and that the complaint of the plaintiffs be and is hereby dismissed.

The majority of the court having arrived at the conclusion that the complaint should be dismissed, considers that other motions and parts of motions to which reference is made above, present no questions for determination.

(S.) JOHN H. DRUFFEL,
(S.) LESTER L. CECIL,
Judges, United States District Court.

Judge Allen concurs in the order of the majority of the court insofar as no restraining order is issued for the reason that it does not appear at this time that the plaintiffs will suffer any irreparable injury by reason of not issuing such restraining order.

Judge Allen dissents from the judgment of the majority of the court in dismissing the complaint of the plaintiffs for the reason that there is not a plain, speedy and efficient remedy in the courts of the State of Ohio.

(S.) FLORENCE E. ALLEN,
Circuit Judge.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO,
EASTERN DIVISION

2/26/54

No. 4032

GEO. F. ALGER COMPANY OF DETROIT, MICH., a Michigan Corporation, et al., *Plaintiffs,*

vs.

JOHN W. PECK, Tax Commissioner, Department of Taxation, State of Ohio, and member of the Ohio Reciprocity Board functioning under Section 5728.15, Revised Code of Ohio, et al., *Defendants*

Before Allen, Circuit Judge, Druffel and Cecil, District Judges

ORDER

The order entered in this case on February 19, 1954, sustaining the motion of the defendant to dismiss, is amended by insertion as follows:

On Page One, Line Six, the word "amended" to appear before the word "complaint". On Page Two, full Paragraph Three, Line Five, the word "amended" to be inserted before the word "complaint". On the same page, full Paragraph Four, Line Two, the word "amended" to be inserted before the word "complaint," and in the last paragraph on Page Two, Line Two, the word "amended" to be inserted before the word "Complaint."

(S.) FLORENCE E. ALLEN,
Judge, United States Court of Appeals.
(S.) JOHN H. DRUFFEL,
Judge, United States District Court.
(S.) LESTER L. CECIL,
Judge, United States District Court.

APPENDIX "B"

List of Plaintiffs

Geo. F. Alger Company of Detroit, Mich., a Michigan corporation;

Arco Auto Carriers, Inc., of Chicago, Ill., an Illinois corporation;

Auto Forwarding Company, of Detroit, Mich., an Illinois corporation;

Automobile Shippers, Incorporated of Detroit, Mich., a Michigan corporation;

Automobile Transport, Inc., of Wayne, Mich., a Delaware corporation;

Baker Driveaway Company, Inc., of Detroit, Mich., a Michigan corporation;

Earl Byron Bartley of Port Matilda, Pennsylvania;

Bolin Drive-a-Way Co., of Cleveland, Ohio, an Ohio corporation;

F. J. Boutell Driveaway Co., Inc., of Flint, Mich., a Michigan corporation;

Brada Cartage Co., of Detroit, Michigan, a Michigan corporation;

Case Driveaway, Inc., of Huntington, W. Va., a West Virginia corporation;

Central Truckaway System, Inc., of Louisville, Kentucky, an Indiana corporation;

Commercial Carriers, Inc., of Detroit, Mich., a Michigan corporation;

Complete Auto Transit, Inc., of Detroit, Mich., a Michigan corporation;

C. A. Conklin Truck Line, Inc., of Adrian, Mich., a Michigan corporation;

Contract Cartage Company of Pontiac, Mich., a Michigan corporation;

Crawford Transport Company, Incorporated, of Huntington, W. Va., a West Va. corporation;

Cushman Motor Delivery, of Chicago, Ill., an Illinois corporation;

Dallas & Mavis Forwarding Co., of South Bend, Ind., an Indiana corporation;

Dixie Transport Co., Inc., of Jacksonville, Fla., a Florida corporation;

E. & L. Transport Company of Dearborn, Mich., a Michigan corporation;

E. & L. Transport, Inc. of Indiana of Dearborn, Michigan, an Indiana corporation;

Eastern Automobile Forwarding Co., of Buffalo, N. Y., a New York corporation;

Gate City Transport Company, of Detroit, Mich., a North Carolina corporation;

Great Lakes Forwarding Corporation of Buffalo, N. Y., a New York corporation;

Hess Cartage Company, of Melvindale, Mich., a Michigan corporation;

Hollywood Cartage Company of Detroit, Mich., a Michigan corporation;

Nicholas Kalahan, d/b/a K. & C. Transport, of Glen Arm, Md.;

Keeshin Motor Express Co., Inc., of Chicago, Ill., an Illinois corporation;

Kenosha Auto Transport Corporation, of Kenosha, Wisc., an Ohio corporation;

C. R. Klinger, d/b/a K. U. K. Auto Transit, of Lykens, Pa.;

Kleitch Bros., Inc., of Dearborn, Mich., a Michigan corporation;

Kramer Bros. Frt. Lines, Inc., of Detroit, Mich., a Michigan corporation;

Long Transportation Company of Detroit, Mich., a Michigan corporation;

M & G Convoy, Incorporated of Buffalo, N. Y., a New York corporation;

Merchants Freight System, Inc., of Terre Haute, Ind., an Indiana corporation;

Metropolitan Convoy Corporation, of Jamaica, N. Y., a Pennsylvania corporation;

Michigan Motor Freight Lines of Detroit, Mich., a Michigan corporation;

Middle Atlantic Transportation Company of New Britain, Conn., a New York corporation;

Red Star Transit Company Inc., of Detroit, Mich., a Michigan corporation;

Leslie Reeser of York Haven, Penna.

Richards Motor Line of Detroit, Mich., a Michigan corporation;

Roadway Transit Company of Dearborn, Mich., a Michigan corporation;

Chas. J. Rogers Transportation Co., of Detroit, Mich., a Michigan Corporation;

Rumpf Truck Line, Inc., Tecumseh, Mich., a Michigan corporation;

Sentle Trucking Company of Toledo, Ohio, an Ohio corporation;

Shippers Dispatch, Inc., South Bend, Ind., an Indiana corporation;

Service Transport Company of Cleveland, Ohio, an Ohio corporation;

Howard Sober, Inc., of Lansing, Mich., a Michigan corporation;

Lawrence E. Spaide of Wilkes-Barre, Pennsylvania;

J. H. Sprecker, Inc., of Lebanon, Penna., a Delaware corporation;

Square Deal Cartage Company of Detroit, Mich., a Michigan corporation;

Steel Trucking Company of Dearborn, Mich., a Michigan corporation;

Transamerican Freight Lines, Inc., of Detroit, Mich., a Delaware corporation;

Transportation Service, Inc., of Detroit, Mich., a Michigan corporation;

Truck Transport Company of Detroit, Mich., a Michigan corporation;

United Trucking Service, Inc., of Detroit, Mich., a Michigan corporation;

West Penn Forwarding Co., of Millvale, Penna., a Delaware corporation;

White Star Trucking, Inc., of Lincoln Park, Mich., a Michigan corporation; and

Wolverine Express, Inc., of Muskegon, Mich., a Michigan corporation;

List of Defendants

John W. Peck, formerly Tax Commissioner, Department of Taxation, State of Ohio, and member of Ohio Reciprocity Board, functioning under Section 5728.15, Revised Code of Ohio;

Robert E. Foley, Registrar of Motor Vehicles, State of Ohio;

George Mingle, Superintendent of State Highway Patrol, State of Ohio;

S. O. Linzell, Director of Highways, State of Ohio, and formerly a member of Ohio Reciprocity Board, functioning under Section 4503.37, Revised Code of Ohio;

Roger W. Tracy, Treasurer of State, State of Ohio;

Robert L. Moulton, member of Ohio Reciprocity Board, functioning under Section 4503.37, Revised Code of Ohio, and member of Ohio Reciprocity Board functioning under Section 5728.15, Revised Code of Ohio;

C. William O'Neill, Attorney General, Ohio, member of Ohio Reciprocity Board functioning under Section 4503.37, Revised Code of Ohio, and member of Ohio Reciprocity Board, functioning under Section 5728.15, Revised Code of Ohio;

Stanley J. Bowers, Tax Commissioner, Department of Taxation, State of Ohio and member of Ohio Reciprocity Board, functioning under Section 5728.15, Revised Code of Ohio; and

U. C. Felty, Director of Highway Safety, State of Ohio and a member of the Ohio Reciprocity Board, functioning under Section 4503.37, as amended, Revised Code of Ohio.

APPENDIX C

Revised Code of Ohio:

5717.02 (5611). Appeals from final determination of the tax commissioner; procedure; hearing.

Appeals from final determinations by the tax commissioner of any preliminary, amended, or final tax assessments, reassessments, valuations, determinations, findings, computations, or orders made by him may be taken to the

board of tax appeals by the taxpayer, by the person to whom notice of the tax assessment, reassessment, valuation, determination, finding, computation, or order by the commissioner is required by law to be given, by the director of finance if the revenues affected by such decision would accrue primarily to the state treasury, or by the county auditors of the counties to the undivided general tax funds of which the revenues affected by such decision would primarily accrue.

Such appeals shall be taken by the filing of a written notice to that effect with the board and with the commissioner within thirty days after notice of the tax assessment, reassessment, valuation, determination, finding, computation, or order by the commissioner has been given or otherwise evidenced as required by law. The notice of such appeal shall set forth, or have attached thereto and incorporated therein by reference, a true copy of the notice sent by the commissioner to the taxpayer of the final determination complained of, and shall also specify the errors therein complained of.

Upon the filing of such notice of appeal the commissioner shall certify to the board a transcript of the record of such proceedings before him, together with all evidence considered by him in connection therewith. Such appeals or applications may be heard by the board at its office in Columbus or in the county where the appellant resides, or it may cause its examiners to conduct such hearing and to report to it their findings for affirmation or rejection. The board may order the appeal to be heard upon the record and the evidence certified to it by the commissioner, but upon the application of any interested party the board shall order the hearing of additional evidence, and it may make such investigation concerning the appeal as it deems proper.

5717.03 (5611-1). Decisions of board of tax appeals; certification; effect.

A decision of the board of tax appeals on an appeal filed with it pursuant to section 5717.01 or 5717.02 of the Revised Code shall be entered on the journal of its proceedings together with the date of such entry.

* * * * * * *

In the case of an appeal from a review, redetermination, or correction of a tax assessment, valuation, determination, finding, computation, or order of the tax commissioner, the decision of the board of tax appeals and the date of the entry thereof upon its journal shall be certified by it by registered mail to all persons who were parties to the appeal before it, the person in whose name the property is listed or sought to be listed, if the decision determines the valuation or liability of property for taxation and if such person is not a party to the appeal, the taxpayer or other person to whom notice of the tax assessment, valuation, determination, finding, computation, or order, or correction or redetermination thereof, by the commissioner was by law required to be given, the director of finance, if the revenues affected by such decision would accrue primarily to the state treasury, and the county auditors of the counties to the undivided general tax funds of which the revenues affected by such decision would primarily accrue.

In the case of all other appeals or applications filed with and determined by the board its decision and the date of the entry thereof upon its journal shall be certified by it by registered mail to the person who is a party to such appeal or application, such persons as the law requires, and such other persons as the board deems proper.

The decisions of the board may affirm, reverse, vacate, or modify the tax assessments, valuations, determinations, findings, computations, or orders complained of in the appeals or application determined by it, and its decisions shall become final and conclusive for the current year unless reversed, vacated, or modified as provided in section 5717.04 of the Revised Code. When a decision of the board becomes final the commissioner and all officers to whom such decision has been certified shall make the changes in their tax lists or other records which the decision requires.

5717.04 (5611-2). Appeal from decision of board of tax appeals; parties who may appeal; certification.

The proceeding to obtain a reversal, vacation, or modification of a decision of the board of tax appeals shall be by appeal to the supreme court or the court of appeals for the county in which the property taxed is situate or in which

the taxpayer resides. If the taxpayer is a corporation, then the proceeding to obtain such reversal, vacation, or modification shall be by appeal to the supreme court or to the court of appeals for the county in which the property taxed is situate, or the county of residence of the agent for service of process, tax notices, or demands, or the county in which the corporation has its principal place of business. In all other instances, the proceeding to obtain such reversal, vacation, or modification shall be by appeal to the court of appeals for Franklin county.

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Appeals from decisions of the board of tax appeals determining appeals from final determinations by the tax commissioner of any preliminary, amended, or final tax assessments, re-assessments, valuations, determinations, findings, computations, or orders made by him may be instituted by any of the persons who were parties to the appeal or application before the board, by the person in whose name the property is listed or sought to be listed, if the decision appealed from determines the valuation or liability of property for taxation and if any such person was not a party to the appeal or application before the board, by the taxpayer or any other person to whom the decision of the board appealed from was by law required to be certified, by the director of finance, if the revenue affected by the decision of the board appealed from would accrue primarily to the state treasury, by the county auditor of the county to the undivided general tax funds of which the revenues affected by the decision of the board appealed from would primarily accrue, or by the commissioner.

Appeals from decisions of the board upon all other appeals or applications filed with and determined by the board may be instituted by any of the persons who were parties to such appeal or application before the board, by any persons to whom the decision of the board appealed from was by law required to be certified, or by any other person to whom the board certified the decision appealed from, as authorized by section 5717.03 of the Revised Code.

Such appeals shall be taken within thirty days after the date of the entry of the decision of the board on the journal of its proceedings, as provided by such section, by the filing by appellant of a notice of appeal with the court to which the appeal is taken and the board. Such notice of appeal shall set forth the decision of the board appealed from and the errors therein complained of. Proof of the filing of such notice with the board shall be filed with the court to which the appeal is being taken. The court in which notice of appeal is first filed shall have exclusive jurisdiction of the appeal.

In all such appeals the commissioner or all persons to whom the decision of the board appealed from is required by such section to be certified, other than the appellant, shall be made appellees. Unless waived, notice of the appeal shall be served upon all appellees by registered mail. The prosecuting attorney shall represent the county auditor in any such appeal in which the auditor is a party.

The board, upon written demand filed by an appellant, shall within thirty days after the filing of such demand file with the court to which the appeal is being taken a certified transcript of the record of the proceedings of the board pertaining to the decision complained of and the evidence considered by the board in making such decision.

If upon hearing and consideration of such record and evidence the court decides that the decision of the board appealed from is reasonable and lawful it shall affirm the same, but if the court decides that such decision of the board is unreasonable or unlawful, the court shall reverse and vacate the decision or modify it and enter final judgment in accordance with such modification.

The clerk of the court shall certify the judgment of the court to the board, which shall certify such judgment to such public officials or take such other action in connection therewith as is required to give effect to the decision. The "taxpayer" includes any person required to return any property for taxation.

Any party to the appeal shall have the right to appeal from the judgment of the court of appeals on questions of law, as in other cases. (125 v H 220. Eff. 10-2-53.)

(Amended Substitute House Bill No. 619)

AN ACT

To provide revenues for the construction of highways by enacting a highway use tax and an excise tax upon the use, distribution or sale of motor vehicle fuel; to create a highway construction and bond retirement fund and to create a highway construction council.

Be it enacted by the General Assembly of the State of Ohio:

Section 5728.01. As used in sections 2 through 15 of this act:

(A) "Motor vehicle" means everything on wheels which is self-propelled, other than by muscular power or power collected from electric trolley wires and other than vehicles or machinery not designed for or employed in general highway transportation, used to transport or propel property over a public highway;

(B) "Commercial car" means any motor vehicle used for transporting property, wholly on its own structure, on a public highway;

(C) "Commercial tractor" means any motor vehicle designed and used to propel or draw a trailer or semi-trailer or both on a public highway without having any provision for carrying loads independently of such trailer or semi-trailer;

(D) "Trailer" means everything on wheels which is not self-propelled, except vehicles or machinery not designed for or employed in general highway transportation and except vehicles whose total weight excluding load is less than three thousand pounds, used for carrying property wholly on its own structure and for being drawn by a motor vehicle on a public highway, including any such vehicle when formed by or operated as a combination of a semi-trailer and a vehicle of the dolly type such as that commonly known as a trailer dolly, except a house trailer;

(E) "Semi-trailer" means everything on wheels which is not self-propelled, except vehicles or machinery not designed for or employed in general highway transportation

and except vehicles whose total weight excluding load is less than three thousand pounds, designed and used for carrying property on a public highway when being propelled or drawn by a commercial tractor when part of its own weight or the weight of its load, or both, rest upon and is carried by a commercial tractor;

(F) "Commercial tandem" means any commercial car and trailer or any commercial tractor, semi-trailer and trailer when fastened together and used as one unit;

(G) "Commercial tractor combination" means any commercial tractor and semi-trailer when fastened together and used as one unit;

(H) "Axle" means two or more load carrying wheels mounted in a single transverse vertical plane;

(I) "Public highway" means any highway, road or street dedicated to public use except a highway under control and jurisdiction of the Ohio turnpike commission created by the provisions of section 5537.02, of the Revised Code.

Section 5728.02. Every person who is the owner of a commercial car with three or more axles or a commercial car which is to be operated as part of a commercial tandem or a commercial tractor which is operated or driven upon a public highway shall, on or before the first day of October, 1953, and on or before the first day of April in each year thereafter, cause to be filed with the registrar of motor vehicles or a deputy registrar of motor vehicles, a written application for a highway use permit on blank forms to be furnished by the registrar for that purpose.

Each application for a highway use permit for a commercial car shall state the number of axles on the commercial car and the maximum number of axles in any commercial tandem of which the commercial car designated in the highway use permit may be a part.

Each application for a highway use permit for a commercial tractor shall state the maximum number of axles in any commercial tractor combination or commercial tandem of which the commercial tractor designated in the highway use permit may be a part.

The application shall be accompanied by a fee of two dollars.

Upon receipt of such application and fee the registrar shall issue, to the person making the application a highway use permit together with an identification plate. Such highway use permit shall show the registration number and state of registration of the commercial car or commercial tractor for which it was issued, the maximum number of axles on the commercial car or the maximum number of axles on any commercial tractor combination or commercial tandem of which such commercial car or commercial tractor is a part and such other plate or sticker which shall be of such design and contain information as the registrar shall deem necessary. Such identification plate shall be displayed on the commercial car or commercial tractor for which it was issued at all times in such manner as the registrar shall prescribe and shall not be transferable. In case of the loss of a highway use permit or identification plate the registrar shall issue a duplicate thereof upon payment of a fee of one dollar.

Such highway use permit shall be valid until the first day of April following the date of issue.

All moneys collected pursuant to the provisions of this section shall be deposited in the state treasury in accordance with the provisions of section 4501.03 of the Revised Code.

Section 5728.03. Within twenty days after the issuance of a highway use permit the registrar of motor vehicles shall deliver to the tax commissioner a copy of such highway use permit.

The registrar, when directed by the tax commissioner, pursuant to the provisions of section II of this act, shall suspend or revoke any highway use permit issued by the registrar. Upon suspension or revocation of a highway use permit the owner of the commercial car or commercial tractor for which such permit was issued shall surrender to the registrar such permit and plate.

The registrar, when directed by the tax commissioner, shall reissue such highway use permit and plate revoked or suspended by him pursuant to the provisions of this section.

Section 5728.04. It shall be unlawful, on and after the first day of October, 1953, for any person to:

(A) Operate a commercial car with three or more axles, a commercial car as part of a commercial tandem or a commercial tractor as part of a commercial tractor combination or commercial tandem on a public highway without first obtaining a highway use permit for such commercial car or commercial tractor:

(B) Operate a commercial car, commercial tandem or a commercial tractor combination on a public highway when the actual number of axles on such commercial car or in such tandem or combination is greater than the maximum number of axles set forth in the highway use permit issued to such commercial car or the commercial car or commercial tractor furnishing the motive power for such tandem or combination.

The judge or magistrate of any court finding any person guilty of unlawfully operating a commercial car or commercial tractor as provided for in this section shall immediately notify the registrar of motor vehicles of such violation and shall transmit to the registrar the name of the owner of the commercial car or commercial tractor operated in violation of this section, the registration number and the highway use permit number issued to such commercial car or commercial tractor.

Upon receipt of such information from any judge or magistrate the registrar shall transmit such information to the tax commissioner.

Section 5728.05. (Whoever violates paragraph (A) of section 4 of this act shall be fined not more than one hundred dollars for a first offense; for each subsequent offense such person shall be fined not less than one hundred dollars nor more than five hundred dollars.

Whoever violates paragraph (B) of section 4 of this act shall be fined not more than one hundred dollars for the first offense; for each subsequent offense such person shall be fined not less than one hundred dollars nor more than five hundred dollars and the highway use permit issued for a commercial car or commercial tractor involved in such violation shall be suspended for a period of ninety days.

SECTION 5728.06. For the purpose of providing revenues to pay the cost of administering and enforcing the laws pertaining to the levy and collection of the tax imposed by this section, to defray the expenses of the highway construction council, to provide funds to pay the state's share of the cost of constructing or reconstructing highways and eliminating railway grade crossings on the major thoroughfares of the state highway system and urban extensions thereof and to pay interest, charges and principal of bonds issued to provide funds to pay the state's share of the cost of such construction, reconstruction and elimination of railway grade crossings, there is hereby levied a highway use tax upon each commercial car with three or more axles, each commercial car used as part of a commercial tandem and each commercial tractor used as part of a commercial tractor combination or commercial tandem at the following rates to-wit: (1) one half cent for each mile traveled in Ohio by each commercial car with three or more axles for which has been issued a highway use permit, pursuant to the provisions of section 2 of this act; (2) one cent for each mile traveled in Ohio by a commercial tractor for which has been issued a highway use permit, pursuant to the provisions of section 2 of this act, authorizing it to operate as part of a commercial tractor combination with a maximum of three axles; (3) one and one half cents for each mile traveled in Ohio by a commercial tractor for which has been issued a highway use permit, pursuant to the provisions of section 2 of this act, authorizing it to be operated as part of a commercial tractor combination with a maximum of four axles; (4) two cents for each mile traveled in Ohio, by a commercial tractor for which has been issued a highway use permit, pursuant to the provisions of section 2 of this act, authorizing it to be operated as part of a commercial tractor combination with a total of five or more axles; (5) two and one-half cents for each mile traveled in Ohio by each commercial car or commercial tractor for which has been issued a highway use permit, pursuant to the provisions of section 2 of this act, authorizing it to be operated as part of a commercial tandem with four or more axles.

The owner of each commercial car and commercial tractor subject to the provisions of this act shall be liable for the

payment of the taxes levied herein. In event that such owner, at the end of any calendar year, has paid a tax for axles not actually used in operation over a given number of miles he may file with the tax commissioner an application for a refund of the excess taxes paid. The application shall state the amount of the tax which has been paid by reason of the use of a tax rate determined by the declaration of the maximum number of axles to be used and the tax amount which would have been required if the rate had been determined by the number of axles actually in use for each mile of travel. The owner of the commercial car or commercial tractor shall be entitled to recover the difference between the two amounts stated in the application upon approval by the tax commissioner. The form of the application shall be prescribed by the tax commissioner and it shall be accompanied by a sworn statement as to its truth. The tax commissioner shall order the amount approved for refund to be paid from the rotary fund created in section 8 of this act.

SECTION 5728.07. Every person who has been issued a highway use permit pursuant to the provisions of section 2 of this act and every person who has been issued a certificate by the public utilities commission of the state of Ohio pursuant to the provisions of section 4921.03 through 4925.05, of the Revised Code, shall keep a complete and accurate record, upon forms prescribed by the tax commissioner, showing the total miles traveled on a public highway in this state by each commercial car and commercial tractor for which such person has been issued a highway use permit and for each commercial car and commercial tractor for which a highway use permit has been issued and which is operated pursuant to such certificate and such other information as the tax commissioner may require. Such records shall be available at any time, during normal business hours, for the inspection of the tax commissioner or his duly authorized agents and shall be preserved for a period of four years.

Section 5728.08. The owner of each commercial car and the owner of each commercial tractor subject to the tax levied by section 6 of this act shall, on or before the 20th

day of January, April, July and October in the year 1954 and on or before the 20th day of January, April, July and October each year thereafter, file with the treasurer of state on forms prescribed by the tax commissioner, a highway use tax return and make payment of the full amount of the tax due for the operation of each commercial car and commercial tractor for which a highway use permit has been issued for the next preceding three calendar months.

Immediately upon the receipt of the highway use tax return the treasurer of state shall mark on such return the date it was received by him, the amount of tax payment accompanying the return and shall transmit such return to the tax commissioner.

Upon the receipt of such taxes the treasurer of state shall deposit the first two hundred fifty thousand dollars collected in a special fund to be known as the highway use tax rotary fund, hereby created, and thereafter as required by the depletion thereof he shall place to the credit of said rotary fund an amount sufficient to make the total of said fund at the time of such credit amount to two hundred fifty thousand dollars. The moneys to the credit of the highway use tax rotary fund, when appropriated by the general assembly, shall be used by the tax commissioner to defray expenses incurred by the department of taxation in administering the provisions of this act pertaining to the levying and collecting of a highway use tax. The emergency board created by section 127.01, of the Revised Code, shall, in addition to the other powers conferred upon it, in the event of any emergency in the administration of this act requiring the expenditure of money in connection with the levy and collection of the tax imposed by section 6 of this act not specifically provided by law, grant authority to the tax commissioner to make expenditures in the same manner in all respects as required by sections 127.01, 127.02, 127.03, and 127.04, of the Revised Code, except that the warrants of the auditor of state shall be drawn against said highway use tax rotary fund.

The balance of taxes received by the treasurer of state pursuant to the provisions of this section shall be deposited in the state treasury to the credit of the highway construc-

tion and bond retirement fund created by the provisions of section 17 of this act.

Section 5728.09. Every person who is the holder of a certificate issued by the public utilities commission of Ohio pursuant to the provisions of section 4921.03 through 4925.05, of the Revised Code shall on or before the 20th day of January, April, July and October of the year 1954 and on or before the 20th day of January, April, July and October each year thereafter, file with the tax commissioner, on forms prescribed by the tax commissioner, a highway use tax information return which shall show the highway use permit number for each commercial car and commercial tractor operated pursuant to such certificate during the next preceding three calendar months and the number of miles such commercial car or commercial tractor was operated in Ohio during the same period.

Section 5728.10. In the event any person required to file a highway use tax return by the provisions of this act, fails to file such return within the time prescribed by this act, files an incomplete return, files an incorrect return, or fails to remit the full amount of the tax due for the period covered by the return, the tax commissioner may make an assessment against such person, based upon any information in his possession, for the period for which such tax was due. The tax commissioner shall give the person against whom such assessment is made written notice of such assessment either by personal service or by registered mail.

A penalty of fifteen per centum shall be added to the amount of assessment made pursuant to the provisions of this section. The tax commissioner shall have power to adopt and promulgate rules and regulations providing for the remission of penalties added to assessments made pursuant to the provisions of this section.

Unless the person, to whom said notice of assessment is directed, shall, within thirty days after service thereof, either personally or by registered mail, file a petition in writing, verified under oath by said person, or his duly authorized agent, having knowledge of the facts, setting forth with definiteness and particularity the items of said assessment objected to, together with the reasons for such ob-

jections, said assessments shall become and be deemed conclusive and the amount thereof shall be due and payable, from the person so assessed, to the treasurer of state. In every case where a petition for reassessment as above described, shall be filed, the tax commissioner shall assign a time and place for the hearing of same and shall notify the petitioner thereof by registered mail, but the tax commissioner shall have the power to continue same from time to time as may be necessary.

Where any person shall have filed a petition for reassessment as herein provided, the assessment as made by the tax commissioner together with penalties thereon shall become due and payable within three days after notice of the finding made at the hearing has been served either personally or by registered mail upon the party assessed.

The person against whom such assessment has been made may appeal from the assessment after it is due and payable to the board of tax appeals in the same time, manner and form as that provided in section 5717.02, of the Revised Code.

After the expiration of the period within which the person assessed may appeal to the board of tax appeals in the manner prescribed in section 5717.02, Revised Code, a certified copy of the entry of the tax commissioner making the assessment final shall be filed in the office of the clerk of courts in the county in which the person's place of business is located or the county in which the person assessed resides, or if the person maintains no office in this state and is not a resident of this state in the office of the clerk of courts of Franklin County.

The clerk of courts, immediately upon the filing of such entry, shall enter a judgment for the people of the state of Ohio against the person so assesssed in the amount shown on the entry.

From the date of the filing of the entry in the county clerk of court's office, the assessment, which includes taxes and penalty, shall bear the same rate of interest and shall have the same force and effect as other judgments. Execution shall issue upon such judgment upon request of the tax commissioner and all provisions of law applicable to sales

on execution shall be applicable to sales under such judgment.

All moneys collected by the tax commissioner under this section shall be paid into the state treasury in the same manner as the revenues deriving from the taxes imposed by section 6 of this act.

No assessment shall be made by the tax commissioner, as authorized by the provisions of this section, more than four years after the last day of the calendar year during which the tax was due. The provisions of this paragraph shall not bar an assessment against a person who failed to file a highway use tax return as required by this section.

Section 5728.11. When the tax commissioner files a certified copy of an entry making an assessment as provided in section 10 of this act, he shall so notify the registrar of motor vehicles and direct the registrar to suspend all highway use permits issued to the person against whom such assessment was made, provided, however, that no highway use permit shall be suspended while an appeal is pending.

Upon payment in full of such assessments and penalties the tax commissioner shall immediately direct the registrar to reinstate all highway use permits issued to the person against whom such assessment was made which have been revoked upon direction of the tax commissioner.

Section 5728.12. Any non-resident of this state, being the owner of a commercial car or commercial tractor subject to the tax imposed by section 6 of this act, who accepts the privilege extended by the laws of this state to non-resident owners of operating such commercial car or commercial tractor or of having the same operated within this state makes the secretary of state of the state of Ohio his agent for the service of process or notice in any action or proceeding instituted in this state against such owner out of the failure to pay the taxes imposed upon him by the provisions of section 6 of this act.

Such process or notice shall be served, by the officer to whom the same is directed or by the tax commissioner, or by the sheriff of Franklin County, who may be deputized for such purpose by the officer to whom the service is directed, upon the secretary of state by leaving at the office

of the secretary of state, at least fifteen days before the return day of such process or notice, a true and attested copy thereof, and by sending to the defendant by registered mail, postage prepaid, a like and true attested copy, with an endorsement thereon of the service upon said secretary of state, addressed to such defendant at his last known address. The registered mail return receipt of such defendant shall be attached to and made a part of the return of such service of process.

Section 5728.13. The provisions of sections 2-12, inclusive, of this act shall not apply to motor vehicles, commercial cars or commercial tractors owned and operated by the United States, this state or any political subdivision thereof.

Section 5728.14. In addition to any other powers conferred upon him by law the tax commissioner shall have the following powers:

(A) To prescribe all forms required to be filed with the treasurer of state or the tax commissioner pursuant to the provisions of this act;

(B) To appoint and employ such personnel as may be necessary to carry out the duties imposed upon him by the provisions of this act;

(C) To adopt and promulgate such rules and regulations pertaining to the levy and collection of the tax imposed by section 6 of this act as he may deem necessary.

(D) To release any property from the lien of any fees, taxes, penalties or interest imposed by this act upon application, provided payment be made to the treasurer of state for the full amount of all taxes and penalties due.

Section 5728.15. The attorney general, the tax commissioner, and a member of the public utilities commission, designated by the commission for that purpose, are hereby authorized and empowered to enter into such reciprocal contracts and agreements with the proper authorities of any state, district or territory of the United States, which levies a highway use tax in addition to motor vehicle registration fees exempting from the provisions of sections 1 through 14 of this act the owner of every motor vehicle which is duly registered in any such state, district or territory provided

such owner has complied with the laws of the state, district or territory of his residence pertaining to the registration and taxation of motor vehicles and complies with such laws while operating and driving such motor vehicle upon the public roads or highways of this state, and provided further, that the owners and operators of motor vehicles registered in this state shall be exempt from all obligations pertaining to the registration and taxation of motor vehicles in such other state, district or territory.

When an agreement or contract has been entered into pursuant to the provisions of this section the attorney general shall cause a copy of such agreement or contract to be filed with the registrar of motor vehicles.

Section 16. For the purpose of providing funds to pay the state's share of the cost of constructing and reconstructing highways and eliminating railway grade crossings on the major thoroughfares of the state highway system and urban extensions thereof; to pay interest, charges and principal of bonds issued to provide funds to pay the state's share of the cost of constructing and reconstructing highways, including but not limited to the elimination of grade crossings, on the state highway system and urban extensions thereof, and to pay the expenses of the highway construction council, an excise tax is hereby levied on all dealers in motor vehicle fuel, upon the use, distribution, or sale within the state by them of motor vehicle fuel, at the rate of one cent per gallon so used, distributed or sold, to be reported, computed, paid, collected, administered, enforced, refunded and subject to the same exemptions and penalties as provided in sections 5526 to 5536-1b, inclusive, of the General Code and sections 5735.01 to 5735.21, inclusive, of the Revised Code as if such sections were specifically set forth herein.

In addition to the data required to be reported by each dealer pursuant to the provisions of subparagraphs (a), (b), (c) and (d) of section 5529, of the General Code, the report by each dealer for the month in which the increase in tax rate imposed by this section becomes effective, shall contain a statement of the number of gallons of motor vehicle fuel which such dealer had received and had on hand

as of the beginning of business on the date such tax increase is effective. Such gallonage shall not include that contained in the fuel supply tank attached to a motor vehicle or any tank or tanks other than those into which motor vehicle fuel was originally received, but shall include all other gallonage on which a tax of only four cents per gallon has been imposed or paid. From the gallonage of motor vehicle fuel so reported on hand as of the date such tax increase becomes effective may be deducted an amount equivalent to that authorized under section 5529-1 paragraph (b) of the General Code. The tax imposed by this section shall be levied against the gallonage reported pursuant to the provisions of this paragraph.

Such motor vehicle fuel shall be deemed to have been "received" by such dealer in the first calendar month from and after the date when this act shall have become effective and shall be included in computing the tax payment by said dealer for that month.

The tax imposed by this section shall be in addition to the tax imposed by sections 5527 and 5541, of the General Code, and by sections 5735.05 and 5735.25, of the Revised Code.

Upon receipt of taxes levied by this section the treasurer of state shall place the first fifty thousand dollars collected in a special fund to be known as the one cent gasoline tax rotary fund hereby created. Thereafter as required by the depletion thereof he shall place to the credit of said rotary fund an amount sufficient to make the total of said fund at the time of each such credit amount to fifty thousand dollars. The refund provided for by the first paragraph of this section shall be paid from such rotary fund. The balance of taxes collected under the provisions of this section, after the credit to said rotary fund, shall be credited to the state highway construction and bond retirement fund created pursuant to the provisions of section 17 of this act.

SECTION 17. There is hereby created in the state treasury a fund to be known as the "state highway construction and bond retirement fund". Moneys to the credit of the state highway construction and bond retirement fund may be expended for the purpose of paying the state's share of the cost of constructing and reconstructing highways and elimi-

nating railway grade crossings on the major thoroughfares of the state highway system and urban extensions thereof; to pay interest, charges and principal of bonds issued for the purpose of providing funds to pay the state's share of the cost of constructing and reconstructing highways, including but not limited to the elimination of railway grade crossings, on the state highway system and to defray expenses incurred by the state highway construction council.

No expenditures shall be made from the state highway construction and bond retirement fund, created by this section, without the written approval of the state highway construction council.

SECTION 18. There is hereby created a "state highway construction council" consisting of three members to be appointed by the governor with the advice and consent of the senate. No member shall hold any appointive or elective office or position, for which he receives compensation, in the service of the state or any of its political subdivisions.

Immediately after this act becomes effective the governor, with the advice and consent of the senate, shall appoint three members of the state highway construction council, one for a term ending on the third Monday in January, 1955, one for a term ending on the third Monday in January, 1956, and one for a term ending on the third Monday in January, 1957. Successors of each of such members of the highway construction council shall be appointed by the governor with the advice and consent of the senate, for terms of three years.

Any member of the council may be removed from office for any of the causes and in the manner provided for in section 3.04, Revised Code. Any vacancy in the office of member of council shall be filled pursuant to section 3.03, of the Revised Code. An appointment to fill a vacancy shall be for the remainder of the term in which the vacancy exists.

Each member of the council shall receive as compensation for his services fifty dollars for each full day spent in the performance of his official duties and shall be reimbursed for his actual expenses incurred in the performance of his official duties. Such compensation and expenses shall be paid out of moneys to the credit of the highway con-

struction and bond retirement fund on vouchers signed by the chairman of the council.

Within thirty days after the original members of the council have been appointed they shall meet and select from among their membership a chairman and a secretary who shall serve until the third Monday in January of 1955. On the third Monday in January, 1955 and on the third Monday in January in each year thereafter the council shall meet and organize by selecting from among its membership a chairman and a secretary to serve for a term of one year.

The chairman shall preside at all meetings of the council.

The secretary shall keep or cause to be kept a complete record of the official proceedings of the council.

The council may adopt such rules and regulations governing its procedure as it may deem necessary.

Upon request of the council the director of highways shall furnish clerical and stenographic assistance to the council.

The council may request and obtain from any department, agency, board, bureau or commission of the state government any information which it deems necessary to assist in the performance of its official duties.

SECTION 19. Prior to the first day of October, 1953 the director of highways shall present to the highway construction council a general plan for the classification of highways on the state highway system. Such plan shall establish, within the state highway system, a system of major thoroughfares which shall include the entire mileage of the interstate highway system.

The council shall review the plan of classification submitted by the director and shall approve such plan or some modification thereof as the general plan for the classification of highways within the state highway system.

Within ten days after the approval of a general plan for the classification of highways on the state highway system the council shall officially notify the director of highways of such approval and furnish to the director of highways a copy of such plan including a complete description of the routes denominated as major thoroughfares on the state highway system.

The council in cooperation with the director of highways shall adopt a system of establishing priorities for construc-

tion of highway projects on the major thoroughfares of the state highway system.

SECTION 20. Prior to the first day of December, 1953 and prior to the first day of December in each year thereafter the director of highways shall submit to the highway construction council a highway construction program containing recommendations for construction of highways on the major thoroughfares and urban extensions thereof in the state highway system. Such program shall contain:

(A) Brief description of each project;
(B) Estimated total cost of each project;
(C) Estimated amount of funds, other than state funds, available to defray the total cost of each project;
(D) The priority for construction for each project.

SECTION 21. The highway construction council shall review the program for the construction of highways submitted to it by the director of highways.

Within thirty days after the receipt of such highway construction program the council shall designate the projects to be financed from moneys to the credit of the highway construction and bond retirement fund and approve the expenditure of such moneys from the fund to pay the state's share of the cost of such projects.

The council shall notify the director of highways in writing of such designation and approval of expenditures and upon receipt thereof, the director of highways shall be authorized to encumber an amount sufficient to pay the state's share of such project out of moneys to the credit of the state highway construction and bond retirement fund.

The state's share of the cost of such project shall be paid out of moneys credited to the state highway construction and bond retirement fund created pursuant to the provisions of section 17 of this act. Any moneys accruing from the provisions of this act, during the present biennium, are hereby appropriated for the purposes for which they were levied and collected under this act.

APR 23 1954
HAROLD B. WILLEY, C

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 714

GEO. F. ALGER COMPANY OF DETROIT, MICH., A MICHIGAN CORPORATION, ET AL.,

Appellants,

vs.

JOHN W. PECK, FORMERLY TAX COMMISSIONER, DEPARTMENT OF TAXATION, STATE OF OHIO, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 714

GEO. F. ALGER COMPANY OF DETROIT, MICH., A MICHIGAN CORPORATION, ET AL.,

Plaintiffs-Appellants,

vs.

JOHN W. PECK, TAX COMMISSIONER, DEPARTMENT OF TAXATION, STATE OF OHIO, AND MEMBER OF THE OHIO RECIPROCITY BOARD FUNCTIONING UNDER SECTION 5728.15, REVISED CODE OF OHIO, ET AL.,

Defendants-Appellees

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

In compliance with the provisions of Rule 12 of the Rules of the Supreme Court the defendants-appellees submit the following statement in opposition to appellants' statement as to jurisdiction and in support of appellees' motion to affirm.

Issue Presented

As set out by appellants in their jurisdictional statement, the sole question presented by this appeal is whether the appellants have a "plain, speedy and efficient remedy in

the courts of" the State of Ohio, within the meaning of Title 28, Section 1341, United States Code.

This action was begun in the District Court for the Southern District of Ohio. Plaintiffs ask for a declaratory judgment that certain statutes of Ohio which levy a so-called "axle-tax" are invalid; and they ask for both temporary and permanent injunctive relief against the enforcement of the statutes. A three-judge court was convened pursuant to statute. Defendants-appellees moved that the action be dismissed on the ground that the District Court lacked jurisdiction under the provisions of Title 28, Section 1341, United States Code. This motion was sustained by the lower court, and plaintiffs have appealed to this Court.

After the allowance of their appeal, appellants moved this Court for a temporary injunction pending its final determination. This motion was heard by Mr. Justice Reed of this Court and was denied. A copy of his order denying the injunction is attached hereto.

The issue thus presented to this Court is the adequacy of the remedy given appellants under the Ohio law.

Ohio Statutes Involved

The tax in question is part of an act which is codified as Sections 5728.01 to 5728.17, Revised Code of Ohio. The tax is levied by Section 5728.06, which provides in part as follows:

> "• • • there is hereby levied a highway use tax upon each commercial car with three or more axles, each commercial car used as part of a commercial tandem and each commercial tractor used as a part of a commercial tractor combination or commercial tandem at the following rates to wit: • • •"

Section 5728.02 provides in part that:

> "Every person who is the owner of a commercial car with three or more axles or a commercial car which is to be operated as part of a commercial tandem or a commercial tractor which is operated or driven upon a public highway shall, on or before the first day of October, 1953 * * * cause to be filed with the registrar of motor vehicles * * * a written application for a highway use permit * * *.
>
> "* * *
>
> "The application shall be accompanied by a fee of two dollars."

Section 5728.04 provides that it shall be unlawful to:

> "(A) Operate a commercial car, * * * a commercial tandem or a commercial tractor * * * on a public highway without first obtaining a highway use permit for such commercial car or commercial tractor; * * *"

and Section 5728.05 provides for a fine of not over $100 for a first offense and not over $500 for subsequent offenses of operating without a use permit.

The collection machinery of the tax levied by Section 5728.06, *supra*, is as follows:

Section 5728.07 provides in part that:

> "Every person who has been issued a highway use permit * * * shall keep a complete and accurate record * * * showing the total miles traveled on a public highway in this state by each commercial car and commercial tractor for which such person has been issued a highway use permit * * *."

Section 5728.08 provides for payment of the tax as follows:

> "The owner of each commercial car and the owner of each commercial tractor subject to the tax * * *

shall, on or before the 20th day of January, April, July and October * * * each year * * * file with the treasurer of state * * * a highway use tax return and make payment of the full amount of the tax due * * *."

We now come to a consideration of whether the Ohio law provides for a "plain, speedy and efficient" method of testing the validity of the above tax. In that connection Section 5728.10, 5717.02, 5717.03, 5717.04 and 5728.11, Revised Code, provide in part as follows:

Section 5728.10

"In the event any person required to file a highway use tax return by the provisions of this act fails to file such return * * * files an incomplete return, files an incorrect return, or fails to remit the full amount of the tax due * * * the tax commissioner may make an assessment against such person * * *. The tax commissioner shall give the person * * * notice of such assessment either by personal service or by registered mail.

"* * *

"Unless the person * * * shall, within thirty days * * * file a petition in writing * * * setting forth * * * the items of said assessment objected to * * * said assessment shall become and shall be deemed conclusive and the amount thereof shall be due and payable * * *. In every case where a petition * * * as above described, shall be filed, the tax commissioner shall assign a time and place for the hearing of same * * *.

"Where any person shall have filed a petition for reassessment as herein provided, the assessment * * * shall become due and payable within three days after notice of the finding made at the hearing has been served * * * upon the party assessed.

"*The person against whom such assessment has been made may appeal from the assessment after it is due and payable to the board of tax appeals in the same*

time, manner and form as that provided in section 5717.02, of the Revised Code.'' (Emphasis supplied)

Section 5717.02, which is referred to above, provides in part as follows:

> "Appeals from final determinations by the tax commissioner * * * may be taken to the board of tax appeals by the taxpayer * * *.
>
> "Such appeals shall be taken by the filing of a written notice to that effect with the board and with the commissioner within 30 days after notice of the * * * order of the commissioner has been given * * *."

Section 5717.03 provides for the journalization and service of the decisions of the board of tax appeals and Section 5717.04 provides for appeals from the board of tax appeals to the Supreme Court or to the Court of Appeals for the county of the taxpayer's residence.

As a final protection to any person perfecting such an appeal, Section 5728.11 provides in part as follows:

> "When the tax commissioner files a certified copy of an entry making an assessment * * * he shall so notify the registrar of motor vehicles and direct the registrar to suspend all highway use permits issued to the person against whom such assessment was made, *provided, however, that no highway use permit shall be suspended while an appeal is pending.''*
> (Emphasis supplied)

It is submitted that the compelling fact in the above statutes *is the fact that plaintiffs cannot be denied the use of the highways nor can the tax in question be collected by any legal process until the validity of the tax has been ruled upon by the Supreme Court of Ohio and by this Court if it grants certiorari.*

Argument

The statutes set out above appear to give a plain remedy, since each step in the process of review is clearly spelled out. The cases involving the application of Section 1341 are collected in 13 A. L. R. (2) at pp. 403 and 406. They illustrate that state remedies have been held adequate even though they involved payment of the tax under protest and required a subsequent action to recover the money so paid. Such statutes were approved by this Court in cases similar to the instant one in *Kohn* v. *Central Distributing Co.*, 306 U. S. 531, and in *Great Lakes Co.* v. *Huffman*, 319 U. S. 293. These cases speak for themselves, and this statement can best serve its purpose by answering the arguments advanced by appellants concerning the Ohio remedy.

Underlying appellant's entire argument is their assertion, constantly repeated, that a state remedy is not adequate unless it permits recourse in the first instance to a court which can extend injunctive relief against the operation of the challenged tax. They do not buttress this contention with any decided case. In view of the decisions of this Court set out above, it is submitted that appellants' argument is without merit.

In conjunction with the above argument appellants also contend that they are not being afforded relief in the *courts* of the state when their objections must first be heard by the Board of Tax Appeals, a quasi-judicial body. This argument was considered by Justice Reed in connection with the temporary order, and he interpreted Section 1341 as referring only to the "orderly procedures for litigating issues" provided for by state law and not as requiring a strained construction of the word "courts." He likened the situation to one in which this Court has repeatedly held that administrative remedies must be exhausted, *Myers* v. *Bethlehem Corp.*, 303 U. S. 41; and he cited a specific case

in which this Court refused to take jurisdiction of an action to enjoin a state commission alleged to be without jurisdiction, when the chief ground for interfering with the state procedure was the cost of preparing for a hearing. *Petroleum Exploration, Inc.*, v. *Public Service Comm.*, 304 U. S. 209. It is submitted that the above cases defeat appellants' argument.

Despite appellants' contentions to the contrary, the procedure by which assessments against them will be tested is the general tax appeal procedure under the Ohio law. See Sections 5728.10 and 5717.02, Revised Code, supra. The assessing machinery of the Tax Commissioner and the reviewing powers of the Board of Tax Appeals were created in 1939 and have been unchanged since. They have brought cases before this Court in at least four instances. See: *Standard Oil Company* v. *Peck*, 342 U. S., 382; *Wheeling Steel Corp.* v. *Glander*, 337 U. S., 562; *International Harvester Company* v. *Evatt*, 329 U. S., 416; *Hooven & Allison* v. *Evatt*, 324 U. S., 652. In each case this Court has apparently found the machinery adequate to present the issues involved. The act which levied the axle-mile tax did not set up a special collection process nor create any new licensing officials or boards; and this case is clearly distinguishable from cases which hold that laws setting up such officials or boards can be attacked without resorting to the appeal procedure provided in the very law under attack.

Appellants also refer to the provision found in Article IV, Section 2 of the Constitution of Ohio that a statute can be held unconstitutional only by a vote of at least six judges of the Ohio Supreme Court. From this they reason that a situation might be presented in which they would appeal a decision of the Ohio Supreme Court on the ground that it denied them due process. On the theory that such

a situation might arise, they ask this Court to deprive the Ohio courts of jurisdiction of an otherwise clear remedy. It is submitted that such a process is too tenuous a way to test such a basic question as the failure of the Ohio Constitution to afford due process.

Finally, appellants refer to multiple assessments and appeals, and to the consequent time and expense involved in prosecuting such appeals. Even if their statements in this regard proved to be accurate, they have been answered by the order of Mr. Justice Reed and the cases which he relied upon. But even further, there is nothing to indicate that the Tax Commissioner has any intention of making quarterly assessments against all of these appellants ad infinitum. While payments must be made quarterly, the final tax liability is not computed until the end of each year. There is no apparent reason for the Tax Commissioner to make endless quarterly assessments which would be later amended merely for the purpose of harassing these appellants, and as a matter of fact he will not do so. By the same token the Tax Commissioner has provided by rule for the remission of statutory penalties in cases where the tax is paid within thirty days of final judicial hearing on any appeal.

In light of the above it is submitted that the appellants have failed to show that the courts of Ohio do not provide a plain, speedy and efficient remedy, and that the appeal herein should be dismissed or the order of the lower court affirmed.

Respectfully submitted,

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Attorneys for Defendants.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

GEO. F. ALGER COMPANY, ET AL., *Appellants*

vs.

JOHN W. PECK, TAX COMMISSIONER, DEPARTMENT OF TAXATION, STATE OF OHIO, and Member of the Ohio Reciprocity Board Functioning Under Section 5728.15, Revised Code of Ohio, et al.

Motion for Temporary Injunction Pending Appeal

Appellants brought this action before a statutory three-judge district court seeking an injunction against enforcement of Sec. 5728.01 through Sec. 5728.14 of the Revised Code of Ohio imposing an "axle-mile tax" on the ground that such provisions are upon various grounds unconstitutional. The district court dismissed appellants' petition for lack of jurisdiction under 28 U.S.C. Sec. 1341 on its determination that "a plain, speedy and efficient remedy may be had in the courts" of Ohio. Appeal from such decision has been noted and appellants seek a temporary injunction pending this Court's disposition of such appeal.

Section 5728.10 of the challenged Ohio statute provides inter alia:

> "The person against whom such assessment has been made may appeal from the assessment after it is due and payable to the board of tax appeals in the same time, manner and form as that provided in section 5717.02, of the Revised Code."

Section 5717.02 provides for appeals from assessments of the Tax Commissioner to a Board of Tax Appeals and by

Sec. 5717.04 a taxpayer challenging such assessment is given the option of appealing from such Board either to the Court of Appeals for the county of the taxpayer's residence or directly to the Supreme Court of Ohio. Under the challenged statute appellants may not be required to pay any assessment until after termination of all appeals from such assessments, and Sec. 5728.11 provides that "no highway use permit shall be suspended while an appeal is pending."

Appellants contend that the Ohio remedy does not conform with that required by Sec. 1341 of the Judicial Code and that they will be irreparably harmed if enforcement of the statute is not enjoined pending determination of this appeal. In particular they argue that the Ohio procedure is not speedy, that it is futile to exhaust the administrative procedures because such bodies cannot pass on constitutional issues and that a remedy before administrative bodies is not a remedy "in the courts" within the meaning of Sec. 1341. They contend that they will be put to great inconvenience and expense due to the statute's requirements that quarterly returns be filed by each appellant, and that appeals be perfected in accordance with statutes or waived.

The Ohio statutes accord an adequate remedy to appellants which they have not yet exhausted. The fact that such procedures cause inconvenience and expense, and that appellant may eventually prevail are not controlling. In enacting Sec. 1341 Congress merely adopted the rule that where orderly procedures for litigating issues have been provided, such procedures must prevail. Cf. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *Petroleum Exploration, Inc.* v. *Public Service Commission*, 304 U. S. 209. I do not read that section to preclude states from prescribing resort to administrative remedies before court review. This is not a case where the state remedy is unknown or such remedy is unavailable. Cf. *Spector Motor*

Service v. *O'Connor*, 340 U. S. 602; *Georgia Railroad & Banking Co.* v. *Redwine*, 342 U. S. 299.

Moreover, even assuming that no state remedy is available, appellants have demonstrated no irreparable injury. The fact that each appellant may be required to file four returns a year and to appeal resultant assessments through prescribed channels is not such injury. It is immaterial that here there are sixty parties who must take these steps since they have voluntarily joined. Their motion is to be considered as though only one movant sought an injunction. No taxes need be paid until final determination of such appeals, and appellants' use of Ohio's roads in the meantime is not impeded. Pursuant to the statute the Tax Commissioner has amended his rules to allow remission of statutory penalties if the taxpayer pays such assessment "within thirty days after notice of final disposition of the assessment." While it may be true that some of appellants would choose not to use Ohio's facilities if they had a determination at this time that the challenged statute is valid, issuance of an injunction will not better their knowledge nor alter their eventual liability. Nothing but a final adjudication of the issues would relieve them from the disadvantages of uncertainty as to liability. The Congress by Sec. 1341 left the burden on the taxpayer to follow the required state procedure rather than to determine the federal issues primarily in the federal courts.

Injunction denied.

(S.) Stanley Reed,
Associate Justice,
Supreme Court of the United States.

March 29, 1954.

APR 29 19
HAROLD B. WILLEY

IN THE

Supreme Court of the United States

October Term 1953

No. 714

GEO. F. ALGER COMPANY of Detroit, Mich., a Michigan corporation, et al., *Appellants*,

v.

JOHN W. PECK, formerly Tax Commissioner, Department of Taxation, State of Ohio, and member of the Ohio Reciprocity Board functioning under Section 5728.15, Revised Code of Ohio, et al., *Appellees*.

APPELLANTS' REPLY BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

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IN THE

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No. 714

GEO. F. ALGER COMPANY of Detroit, Mich., a Michigan corporation, et al., *Appellants*,

v.

JOHN W. PECK, formerly Tax Commissioner, Department of Taxation, State of Ohio, and member of the Ohio Reciprocity Board functioning under Section 5728.15, Revised Code of Ohio, et al., *Appellees*.

APPELLANTS' REPLY BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

Appellees agree with us that the issue presented on this appeal is whether "a plain, speedy and efficient remedy may be had in the courts" of Ohio, within the meaning of 28 U.S.C. Sec. 1341, in our attack on the constitutionality of the Ohio highway use tax statute. They move to dismiss or affirm, however, on the basis of arguments intended to show that the federal question raised on this appeal is not substantial. This brief is a reply to those arguments, which, in general, fall under the headings discussed below.

I. In determining whether the laws of Ohio provide "a plain, speedy and efficient remedy * * * in the courts" within the meaning of 28 U.S.C. Sec. 1341, the only applicable precedents are decisions dealing with the consideration by state administrative boards of questions as to the constitutionality of a state tax, and not decisions in cases where the constitutionality of the state tax could be attacked in an action at law to recover the tax after payment under protest.

Appellees begin their argument by citing *Kohn* v. *Central Distributing Co.*, 306 U.S. 531, and *Great Lakes Co.* v. *Huffman*, 319 U.S. 293, along with a general reference to other cases holding that 28 U.S.C. Sec. 1341 bars federal jurisdiction of a suit to enjoin a state tax where under state law an action at law could be brought to recover the tax after it was paid under protest. The reference to these cases is entirely irrelevant, as appellees have never contended that an adequate remedy of this kind was available to us under Ohio law. On the contrary, their counsel admitted at the hearing before the three-judge court that an action to recover the tax after it is paid is an inadequate remedy in Ohio. This admission was fully warranted, for under Section 2723.05, Revised Code of Ohio, the judgment in such an action would run only to "such part [of the tax] as is at the time of such judgment or order unexpended and in the possession of the officer collecting the same * * *." Cf. *Adams County* v. *Northern Pac. Ry. Co.*, 115 F. 2d 768, 776 (C.C.A. 9, 1940), where the fact that the statutory refund action would be against insolvent counties, so that the judgment would result only in the issuance of uncollectible warrants, made it inadequate and therefore not "efficient" within the meaning of the statute. Also *Georgia R. Co.* v. *Redwine*, 342 U.S. 299, 303, where this Court held that a suit for refund applicable to only 15% of the taxes in controversy was not a "plain, speedy and efficient remedy."

A "plain, speedy and efficient remedy * * * *in the courts*" is also available where the state courts have jurisdiction to enjoin the collection of illegal taxes. E.g., *Phipps* v.

School Dist. of Pittsburgh, 111 F. 2d 393, 397 (C.C.A. 3, 1940). But equitable relief is barred in Ohio by Section 5703.38, Revised Code of Ohio, which prohibits injunctions staying any order, determination, or direction of the Department of Taxation, or any action of other state officials taken pursuant thereto.

Thus, while there are many cases sustaining the adequacy of legal or equitable remedies, they have no application here. Where one may bring an action at law to recover the tax after payment under protest, or may bring a suit in equity to enjoin the assessment or collection of an illegal tax, he is afforded a judicial remedy from the outset—a "*remedy • • • in the courts*"— as his action is brought *in a court of original jurisdiction*, a court with full authority to consider and decide all issues, including constitutional issues, which may be raised. The statutory procedure which is forced on appellants by the decision below is not of that character. On the contrary, it calls first for a review of an assessment by the Tax Commissioner, who made the assessment in the first instance, and then for an appeal from the reassessment to the Board of Tax Appeals. Both the Tax Commissioner and the Board of Tax Appeals are admitted to have no authority to declare a law unconstitutional. Only after these two fruitless steps have been taken does one get into a judicial forum, by taking an appeal to either the Supreme Court of Ohio or the appropriate Ohio Court of Appeals. *In either case one is in the anomalous position of being compelled to seek appellate review of a decision rendered in a forum which did not have original jurisdiction.*

In contrast to the *Kohn* and *Great Lakes Co.* cases cited by appellees, *Hillsborough* v. *Cromwell*, 326 U.S. 620, presents a factual situation more nearly analogous to the present case. There the remedy of an aggrieved taxpayer was an appeal to the state board of tax appeals. Decisions of this board were reviewable on certiorari by the state supreme court, with an appeal from that court to the court of

errors and appeals. In that case this Court held that the District Court had jurisdiction of a declaratory judgment action attacking the validity of certain tax assessments because "there was such uncertainty surrounding the adequacy of the state remedy * * *" (326 U.S. at 626). In reaching this conclusion this Court laid great stress on the fact that "the state board of tax appeals to which respondent might have appealed concededly has no right to pass on constitutional questions" (326 U.S. at 625). *That is precisely the situation we have here.* While the subsequent judicial review there differed in some respects from that available under the Ohio procedure, we submit that this limitation on the jurisdiction of the administrative tribunal is alone sufficient to require a holding that administrative review is not "a plain, speedy and efficient remedy * * * *in the courts" of Ohio.*

II. The phrase, "plain, speedy and efficient remedy * * * in the courts of such State," as used in 28 U.S.C. Sec. 1341, means a remedy available at the very outset of the controversy in a court of law or equity, and it does not include a procedure calling for successive reviews before an administrative officer and an administrative board, neither of which has jurisdiction to pass on the basic issue in the controversy, with a subsequent review of their decision by a court having only appellate jurisdiction.

Appellees misapprehend the burden of our argument when they say we insist "that a state remedy is not adequate unless it permits recourse in the first instance to a court which can extend injunctive relief against the operation of the challenged tax." Rather, we maintain that an adequate remedy must permit recourse in the first instance to a court of original jurisdiction which has full authority to pass on every issue raised. Indeed, as we pointed out in our Jurisdictional Statement, if the court does not have such full authority the proceeding before it is not even a "remedy", for a lack of jurisdiction to decide an essential issue in the case prevents the court from enforcing the right or redressing the injury. Moreover, due

process of law under the Fourteenth Amendment requires "a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; * * *." *Pennoyer* v. *Neff*, 95 U.S. 714, 733.

The construction of Section 1341 which we urge is proper on a literal reading of that statute, and there is no justifiable basis for giving this language anything other than a literal interpretation. *A comparison of Section 1341 with the similar provisions of 28 U.S.C. Sec. 1342 prohibiting injunctions against any order "made by a State administrative agency" where, among other things, a "plain, speedy and efficient remedy may be had in the courts of such State" demonstrates that Congress referred expressly to "a State administrative agency" when it had such an agency in mind, in the same statute in which it referred to a remedy "in the courts of such State."* Both these sections are based on Section 41(1), Title 28, U.S.C. 1940 Ed. *In the circumstances, the only reasonable conclusion is that by "the courts of such State" Congress meant only judicial tribunals, and did not include administrative tribunals in that term.*

Significantly, Sec. 41(1) of the former Title 28, on which both Secs. 1341 and 1342 of the present Title 28 are based, provided that the remedy necessary to deprive the District Courts of jurisdiction of the specified classes of injunction proceedings was a remedy "at law or in equity in the courts of such State." Section 41(1) also defined the jurisdiction of the District Courts as including "all suits of a civil nature, at common law or in equity" in certain general classes. The various enactments going to make up Section 41(1) are, of course, *in pari materia*, and must be construed together. Obviously Congress in using the phrase "at common law or in equity" in defining the jurisdiction of the District Courts, and the virtually identical phrase "at law or in equity" in the provision taking away a part of that jurisdiction, must have had in mind in each instance the same concept—a judicial proceeding. The Reviser's Notes

indicate that the phrase "at law or in equity" was omitted as unnecessary in the formulation of the present Section 1341, an action which is consistent only with the view that the section refers to the courts in the commonly-accepted sense of the term. The terms "at law or in equity" from their very nature refer only to courts; they are inappropriate in connection with administrative tribunals.

A comparison of Sections 41(1) and 379 of the former Title 28 (now Sections 1341 and 2283, Title 28, United States Code) also indicates that "the courts of such State" as used in the former does not include state administrative tribunals. Section 379 provided that "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State", with an exception not here material. The term "any court of a State" was held by this Court (in construing R.S. § 720, from which Section 379 was derived) not to include a mere administrative agency of the State. *Mississippi R.R. Com.* v. *Illinois Cent. R.R.*, 203 U.S. 335, 341. *It is illogical to say that Congress intended the same term in Section 41 (1) to have a different meaning.*

This case involves the application to a new situation of old and familiar equitable principles, for in *Hillsborough* v. *Cromwell*, 326 U.S. 620, 622-623, this Court pointed out that Section 41(1) of the former Title 28 was a recognition and sanction by Congress of the practice of the federal equity courts in cases where they were asked to enjoin the collection of a state tax to give peculiar force to Section 267, Judicial Code, which provided that suits in equity shall not be sustained in the federal courts "in any case where a plain, adequate, and complete remedy may be had at law." This statute was of course merely declaratory, making no change whatever in the rules of equity on the subject of legal remedy. *Boyce* v. *Grundy*, 3 Pet. 210, 215. In the *Hillsborough* opinion this Court also quoted (326 U.S. at 629) from *Greene* v. *Louisville & I.R. Co.*, 244 U.S. 499, 520, "A remedy at law cannot be considered adequate, so as to prevent equitable relief, unless it covers the entire

case made by the bill in equity." The remedy which is forced on appellants by the decision below does not meet this requirement, for the Tax Commissioner and the Board of Tax Appeals admittedly do not have authority to declare the highway use tax statute unconstitutional. Since this issue as to constitutionality is at the heart of the complaint in this action, the state administrative procedure does not cover the entire case made by the complaint. Therefore it is not equivalent to an adequate remedy at law under the old equity rule, and for the same reason it cannot be "a plain, speedy and efficient remedy * * * *in the courts*" under the present Section 1341.

III. The doctrine requiring exhaustion of administrative remedy before seeking judicial relief is not applicable here.

Appellees, citing *Myers* v. *Bethlehem Corp.*, 303 U.S. 41, and *Petroleum Exploration, Inc.* v. *Public Service Comm.*, 304 U.S. 209, appear to contend that the review by the Tax Commissioner and the Board of Tax Appeals is an administrative remedy which must be exhausted before judicial relief may be sought.

The short answer to this contention is that a taxpayer is not required to go through the futile steps of applying to state administrative authorities for relief from an unconstitutional tax before applying to the federal court for injunctive relief, as the administrative authorities cannot do otherwise than assume the validity of the statute. *Buder* v. *First Nat. Bank*, 16 F. 2d 990, 992-993 (C.C.A. 8, 1927), certiorari denied, 274 U.S. 743; *Southern Boulevard R. Co.* v. *City of New York*, 86 F. 2d 633, 634-635 (C.C.A. 2, 1936), certiorari denied, 301 U.S. 703; cf. *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557, 562; *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, 454-455. To require administrative review as a prerequisite to application for judicial relief in a case of this kind, where the administrative agencies are admittedly powerless to give the relief sought, would exalt form over substance. In such circumstances administrative review would be a mere shibboleth, meaningless

of itself, useful only to gain access to judicial relief. Neither the *Myers* nor the *Petroleum Exploration* decision imposes such a senseless requirement on a litigant.

However applicable the *Myers* case may have been on the question whether appellants were entitled to a temporary injunction pending appeal, it has no application here where the only issue is whether a remedy is available to appellants in the courts of Ohio sufficient under 28 U.S.C. Sec. 1341 to deprive the District Court of jurisdiction of this action to enjoin an Ohio tax on the ground of unconstitutionality. In that case the Bethlehem Corp. was seeking to enjoin the National Labor Relations Board from holding "a hearing for the purpose of determining whether or not [Bethlehem Corp.] has engaged at its Fore River Plant in any so-called unfair labor practices under the National Labor Relations Act, and from having any proceedings or taking any action whatsoever, at any time or times, with respect thereto" (303 U.S. at 46). Bethlehem Corp. contended primarily that it was not engaged in interstate or foreign commerce and that therefore it was not subject to the jurisdiction of the Board.[1] This Court held that the power to prevent unfair practices affecting commerce had been vested by Congress in the N.L.R.B. and the Circuit Court of Appeals, so that the District Court was without jurisdiction. To the further contention of Bethlehem that the hearing to establish that its business did not involve interstate or foreign commerce would subject it to irreparable damage, this Court replied that this contention could not be used to circumvent the requirement of the exhaustion of the administrative remedy.

In the *Petroleum Exploration* case the plaintiff sought to enjoin the Public Service Commission of Kentucky from

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[1] Bethlehem's complaint also challenged the constitutionality of the National Labor Relations Act (see 88 F. 2d at 155 and 303 U.S. at 46), but this contention was not discussed in the opinion, possibly because (as this Court pointed out, 303 U.S. at 52) the constitutionality of the Act had already been sustained in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1.

prosecuting an investigation of rates for gas marketed by it under contract in Kentucky, the asserted ground for relief being that Petroleum was a not a public utility and therefore the regulation of its rates was beyond the statutory power of the Commission. This Court held, *inter alia*, that there was equitable jurisdiction to enjoin the proposed investigation if the order to show cause carried a threat of imminent, irreparable injury, but that the allegations as to the cost of preparing for the hearing did not present the sort of irreparable injury against which equity protects.

Thus, the factual situations in the *Myers* and *Petroleum* cases are entirely different from the situation presented here. In both those cases the plaintiff was confronted with only an administrative investigation, and the suit was brought in an effort to avoid the investigation. In both cases this Court held that the expense, inconvenience, loss of good will, etc., attendant on preparing for and meeting the investigation did not justify interference by a federal equity court with this state administrative proceeding (303 U.S. at 47-48; 304 U.S. at 220-221), with the additional factor in the *Myers* case that Congress had vested exclusive jurisdiction of the subject-matter in the N.L.R.B. and the Circuit Court of Appeals (303 U.S. at 48-49). In each of these cases the jurisdiction of the administrative agency over the complaining party depended on the existence of a fact which was within the province of the administrative agency to determine, i.e., whether the N.L.R.B. complaint concerned interstate or foreign commerce (*Myers*, 303 U.S. at 49), and whether the company was a public utility (*Petroleum*, 304 U.S. at 211). In neither case could it be determined before the administrative investigation was completed whether the complaining party's interests would be affected; in each case the compulsory and punitive powers of the administrative agency were exercised only through the courts (303 U.S. at 48-49; 304 U.S. 219, 223).

The situation here is in sharp contrast to that in the *Myers* and *Petroleum* cases. Here a tax is levied by a

state statute, and the statute fixes the rate. If, as appellants contend, that rate is excessive and discriminatory and therefore unconstitutional, the vice is in the statute itself. *This situation was not created by anything which the state administrative agencies did, nor can it be changed by anything they can do in the future. The basic issue of constitutionality is outside their jurisdiction. The issue on this appeal, then, is whether the right to a hearing before these administrative forums impotent to grant the relief sought is sufficient under Section 1341 to deprive the District Court of jurisdiction which admittedly it otherwise has.* We submit that Circuit Judge Allen, the dissenting member of the three-judge District Court, answered this question correctly in holding that "there is not a plain, speedy and efficient remedy in the courts of the State of Ohio."

IV. The issue presented here has not been decided in any of the previous cases coming to this Court from Ohio involving Ohio taxes.

Appellees contend that the administrative procedure here involved is the general tax appeal procedure under the Ohio law, and that this procedure has brought other cases to this Court in which "this Court has apparently found the machinery adequate to present the issues involved." The cases cited and the issues which they involved are as follows:

Standard Oil Co. v. *Peck*, 342 U.S. 382—In the notice of appeal from the reassessment of the Tax Commissioner to the Board of Tax Appeals there were 13 assignments of error challenging the rulings of the Tax Commissioner on a variety of factual questions. Assignment 2 was that the Tax Commissioner erred in failing to eliminate from appellant's 1945 personal property tax assessment certain towboats and barges and "in holding that said boats and barges were taxable in Ohio" (No. 184, October Term 1951, Record 45-46). These boats and barges were being operated on the Ohio and Mississippi Rivers. No question

was raised as to the constitutionality of any state statute.

Wheeling Steel Corp. v. *Glander*, 337 U.S. 562—The general question here was the taxable situs of accounts receivable and other intangible property. The Tax Commissioner's opinion showed that the validity of the assessment was contested on the grounds that Section 5328-2, General Code of Ohio, was not applicable and that "the construction of Section 5328-1 and Section 5328-2, General Code, adopted by the Tax Commissioner, is in violation of the Fourteenth amendment to the Constitution of the United States and the Constitution of the State of Ohio for as construed, such sections operate to tax intangible property of a nonresident over which Ohio has no jurisdiction and which has no business situs in Ohio" (No. 447, October Term 1948, Record 34, 57-58). Even in the *per curiam* opinion of the Supreme Court of Ohio it appears that the attack of the company was on "this interpretation of Section 5328-2 * * *" (*Ibid.*, Record 20). It therefore appears that at the time this litigation was instituted the principal complaint of the company was that the Tax Commissioner was not properly construing and applying the Ohio law.

Harvester Co. v. *Evatt*, 329 U.S. 416—The question here was whether the use by the Tax Commissioner, in applying to the company's business the statutory formula for determining the amount and value of Ohio manufacturing and sales, as distinguished from interstate and out-of-state sales, of the sales proceeds of goods manufactured in Ohio and sold elsewhere and of goods manufactured elsewhere and sold in Ohio, violated the Due Process Clause of the Fourteenth Amendment and the Commerce Clause of the Federal Constitution. The constitutional issue arose because of the inclusion by the Tax Commissioner of these challenged amounts in applying the tax formula.

Hooven & Allison Co. v. *Evatt*, 324 U.S. 652—The question here was whether Hooven & Allison was the importer of certain fibers and, if so, whether these fibers in their hands, stored in the original packages preliminary to their use, were subject to a state ad valorem tax. Clearly these

factual issues had to be decided before one could tell whether a constitutional issue was raised.

None of the foregoing cases is applicable here, for in each of them what was challenged was the action of the Tax Commissioner and the Board of Tax Appeals in the performance of a legislative function. In the present case appellants are attacking the right of the Tax Commissioner and the Board of Tax Appeals to act under the challenged law because of the alleged unconstitutionality thereof, as well as their absolute lack of authority to act in passing upon the question as to the constitutionality of said law.

Moreover, none of the litigants in the above-mentioned cases made any effort to have its cause heard in the Federal District Court, so that none of those decisions deals with the question whether this state administrative procedure is "a plain, speedy and efficient remedy * * * in the courts" of Ohio within the meaning of Section 1341.

Appellees' suggestion that "this Court has apparently found the [state administrative] machinery adequate to present the issues involved" in the above-mentioned cases is misleading. The question here is whether that machinery provides a "remedy" which is "plain, speedy and efficient." The reason why this machinery is ineffective and inefficient in presenting constitutional issues is demonstrated in the records of at least two of those cases. Where constitutional arguments were touched on in the presentation of the *Wheeling Steel* case the Tax Commissioner expressly disavowed authority to decide them, and in that case and in the *Standard Oil* case the Board of Tax Appeals did likewise, citing as authority for its position the opinion of this Court in *Hillsborough* v. *Cromwell*, 326 U. S. 620 (*Wheeling Steel Corp.* v. *Glander*, October Term 1948, No. 447, Record 34, 57-58, 71; *Standard Oil Co.* v. *Peck*, October Term 1951, No. 184, Record 18).

We point out in passing that appellees have apparently misconstrued our reference to the provision in the Ohio Constitution limiting the power of the Supreme Court of that State to declare a law unconstitutional. We are not, as appellees seem to think, seeking to raise on this appeal the question whether that provision in the Ohio Constitution is a denial of due process where the question of the constitutionality of the statute under attack must first be raised before an administrative tribunal without jurisdiction or authority to decide it. Instead, we are merely calling attention to the fact that this issue as to the denial of due process will be raised if we are compelled to follow the administrative procedure forced on us by the decision below.

CONCLUSION

For the foregoing additional reasons, we respectfully submit that the question presented on this appeal is substantial, that the judgment of the District Court should be reversed, and that the cause should be remanded for the consideration of appellants' complaint on its merits.

Respectfully submitted,

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No. 714. GEO. F. ALGER CO. ET AL. *v.* PECK, FORMERLY TAX COMMISSIONER OF OHIO, ET AL. Appeal from the United States District Court for the Southern District of Ohio. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. MR. JUSTICE DOUGLAS is of the opinion probable jurisdiction should be noted and the case set for argument. *Joseph B. Keenan, Alvin O. West,*

Edmund M. Brady, Taylor C. Burneson and *Joseph L. Nellis* for appellants. *C. William O'Neill*, Attorney General of Ohio, and *Joseph S. Gill*, First Assistant Attorney General, for appellees. Reported below: 119 F. Supp. 812.